JUDICIAL REDEFINITION OF STATE ACTION IN REGARD TO DUE PROCESS ISSUES IN NONPUBLIC EDUCATIONAL INSTITUTIONS

By

DENNIS DAILEY MURPHY

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Dennis Dailey Murphy

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The problem investigated in the study was whether and to what extent there has occurred or is occurring judicial redefinition of state action in regard to due process issues in nonpublic educational institutions. Detailed investigation through comprehensive legal research methods focused primarily upon the United States Constitution, as amended, and court cases, particularly those of the United States Supreme Court. Conceptual perspective on the meaning of state action was gained through analysis of jurisprudential and policy considerations, state action theories, and other considerations. Contextual perspective on the operation of state action was gained through analysis of state action categories and other considerations. Conceptual perspective on the meaning of due process was gained through

analysis of the concept's history, the constitutionally cognizable interests of liberty and property, the operational duality of procedural and substantive due process, and the relationship of due process with the Bill of Rights. Contextual perspective on the operation of due process was gained through analysis of the broader milieu and the narrower milieu, and through detailed inspection and analysis of due process cases. Procedural and substantive due process cases involving public and nonpublic institutional employees and procedural and substantive due process cases involving public and nonpublic institutional clients were closely examined. It was shown that only procedural due process cases involving nonpublic institutional clients could indicate any judicial redefinition of state action in regard to due process issues in nonpublic educational institutions. It was concluded that expansive redefinition had not occurred and was not occurring, although implications for educational administration of a possible redefinition were still important.

CHAPTER I

INTRODUCTION

Nonpublic educational institutions are similar but not identical to their public counterparts. The definitional distinction focuses upon the degree of government involvement with the institutions. Among the important consequences of this distinction has been the application or nonapplication of federal constitutional restrictions to the institutions.

The fourteenth amendment and its restrictions ostensibly apply only to a state:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[1]

The amendment's due process restrictions upon administrative action would seem to apply only where that action is state action. It would seem to apply to public educational institutions, then, but not to nonpublic institutions.

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[1] U.S. Const. amend. XIV (emphasis added).

Judicial redefinition of the restriction-triggering state action concept to encompass not only direct actions of the state but also actions not directly attributable to the state, complicates simple "plain meaning" interpretation.

Statement of the Problem

The problem investigated in the study was whether and to what extent and effect there had occurred or is occurring judicial redefinition of state action in regard to due process issues in nonpublic educational institutions. Derivative points of inquiry necessarily included the circumstances and rationale that could produce such redefinition, the scope of such redefinition, and the implications of such redefinition for educational administration.

Justification for the Study

Educational administrators must be aware of the legal limitations and restrictions that circumscribe their actions. This is true no less in nonpublic than in public educational institutions. Nonpublic educational administrators, however, may not know whether fourteenth amendment due process restrictions apply to their actions. They are even less likely to understand why due process restrictions do or do not apply. The primary purpose of the study was to provide the needed knowledge and understanding.

The problem investigated in the study was important, and its pursuit justified, in a larger context, as well. For a nonpublic educational institution, consequences of a finding of state action and the imposing of fourteenth amendment restrictions and standards of due process range from implementation of potentially expensive procedural due process machinery for students, or for faculty and other employees, to alteration of institutional prerogatives of internal governance, to modification of institutional purpose. Such changes in matters from resource allocation to institutional philosophy would necessarily be of great moment for any theretofore nonpublic educational institution. Many nonpublic educational institutions already provide procedural safeguards from arbitrary administrative action, of course, but the standards of fairness and the rigor with which individual interests are protected vary from institution to institution.

In view of the implications for educational institutions and educational administrators of state action development and redefinition, a study of state action in the educational context focusing upon due process issues was worthwhile. Conclusions could be helpful to educators for both operational and planning purposes.

Scope of the Study

Reflected in the study were the raw data of legal research, the United States Constitution, as amended, statutes, published court opinions, and published administrative decisions. Such data promulgated or rendered since adoption of the United States Constitution in 1789 were considered acceptable. Reflected also was authoritative opinion published in books, legal journals and law reviews.

Analysis of these data in the study was delimited primarily by general focus upon the three clauses of the fourteenth amendment of the United States Constitution, the privileges or immunities, equal protection, and due process clauses, with specific focus and emphasis upon the last. Emphasis upon alternative theories and remedies under state law for due process complaints was beyond the scope of the study. Analysis of implications for educational administration of a redefinition of state action in regard to due process issues in nonpublic educational institutions drew upon the published works of legal theorists as well as theorists of administration generally and educational administration specifically.

Assumptions

It was assumed that the judicial doctrine of *stare decisis* elicits evolutionary development of legal concepts through judicial opinion.

Definition of Terms

Certiorari. Review, on a discretionary basis, by a higher appellate court of a lower court's handling of a case.

De facto. A situation that exists in fact, whether or not lawful.

De jure. A situation that exists by operation of law.

Dictum. Language in a court opinion on a point of law not necessary to the decision at hand and not binding as precedent.

In loco parentis. In the authoritative place of the parent.

Nonpublic. Private, nongovernmental.

Nonpublic educational institution. Nonproprietary educational institution of elementary, secondary, or post-secondary level which is not operated by a state, subdivision of a state, or governmental agency within a state.

Parens patriae. The sovereign power of guardianship by the state over persons under disability, including minors.

Precedent. Authoritative decision on a point of law to be followed in similar cases arising subsequently.

Proprietary. For profit.

Public educational institution. Nonproprietary educational institution of elementary, secondary, or post-secondary level which is operated by a state, subdivision of a state, or governmental agency within a state.

Societal institution. A complex of crystallized, definitive and enduring norms and roles regarded as essential for the society.

Stare decisis. Adherence to precedent in judicial proceedings.

Ultra vires. Beyond the power of an agency or official.

Sources of Data

Use of a combination of primary and secondary legal sources constituted the legal research method of the study. Primary sources were statutes, and court and administrative agency decisions, identified by use of legal digests, legal encyclopaedias, annotated federal and state statutes, and the precedential citation system. This last system, commonly known as Shepard's Citations enables the legal researcher to find all cases subsequent to a given case which cite that case as precedent, as distinguishable, or generally as worthy of mention in the resolution of those subsequent cases. Secondary sources comprised books, legal journals, and law reviews, identified by use of the Index of Legal Periodicals, and by reference made in cases, annotated statutes, and other books and periodical articles. Sources for administrative theory included books and administration or education journals.

CHAPTER II

STATE ACTION: CONCEPTUAL PERSPECTIVE

Introduction

State action is a judicially created notion, a legal concept. It is not easily defined in the abstract, however. One commentator went so far as to assert that it is "entirely contextual, and has no independent existence."[1] To be sure, state action has been judicially developed on a case-by-case basis. Contextual perspective accordingly forms the basis of Chapter III. Conceptual perspective, taking account of general jurisprudential and policy considerations, is no less helpful in fostering understanding of the concept, of course; it serves to make contextual perspective more easily achieved and more broadly meaningful.

The Meaning of State Action: Jurisprudence and Policy

The major conceptual issue in state action cases is whether fourteenth amendment restrictions will be triggered

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[1] Note, State Action and the Burger Court, 60 Va. L. Rev. 840, 841 (1974).

by a finding of state action as a matter of law. The overriding policy issue is the extent to which federal constitutional restrictions should be a "hedge upon private actions."[2] Complicating resolution of these issues is the task of defining "state action," a difficult one for judges, lawyers, and legal scholars alike.

In an attempt at clarifying the definitional dimensions of state action, the United States Supreme Court has stated:

> This Court has never attempted the "impossible task" of formulating an infallible test for determining whether the state "in any of its manifestations" has become significantly involved in private discrimination. "Only by sifting the facts and weighing circumstances" on a case by case basis can a nonobvious involvement of the state in private conduct be attributed its true significance.[3]

Use of a low, contextual level of abstraction is helpful in that it permits classification of state action cases into categories, but not so helpful in that it fails to facilitate formulation of any pithy definition of state action. Indeed, the only arguably helpful definition of state action which does not focus upon specific facts is a conceptual tautology: state action is that public or ostensibly private activity which permits application of

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[2] J.N. Story & L. Ward, Perspectives of American Law 105 (1974).

[3] Reitman v. Mulkey, 387 U.S. 369, 378 (1967).

fourteenth amendment restrictions to it. Moreover, "nominally private action may well be deemed governmental for constitutional purposes, but remain legally private for all other purposes."[4]

Perhaps more helpful would be mention of what state action is not. State action, as the term is used here, is not identical with government action. Government action would encompass federal as well as state activity. Although the federal government can have similar connections with private conduct to those of state governments, and although through the Bill of Rights the federal government is under similar constitutional restraints, it is nevertheless not subject to operation of the fourteenth amendment. The legal concept of state action derived from that amendment is thus not applicable to the federal government.

Another perhaps helpful approach to achieving some measure of definitional clarity to the state action concept would be to note its manner of association with other legal concepts. It will be recalled that the fourteenth amendment prohibits state action which abridges the privileges or immunities of citizens of the United States, or deprives any person of life, liberty, or property, without due process of law, or denies any person the equal protection of the laws. State action, then is associated with the other fourteenth

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[4]Martin, The NCAA and the Fourteenth Amendment, 11 New Eng. L. Rev. 383, 393 (1976).

amendment concepts of "privileges or immunities," "due process," and "equal protection."

Judicial treatment of the privileges or immunities clause has contributed little to the development of the state action concept. The clause has been held to such narrow applicability that few cases have arisen thereunder.[5] In going from the abstract to the concrete, from the conceptual to the contextual, courts have used other clauses.

Those other clauses have been the due process and equal protection provisions of the fourteenth amendment. Most of the cases which have contributed in major ways to the development of the state action concept have arisen under equal protection.[6] Still, state action is the threshold issue in cases arising under any of the three clauses; the finding of state action is a procedural condition precedent to a court's hearing of the merits of a fourteenth amendment case.

From a jurisprudential perspective, it may be seen that the state action requirement in equal protection and due process cases is no more unitary than the requirement that violation of specific due process or equal protection derivative rights be asserted.[7] Due process and equal

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[5] See The Slaughter-House Cases, 16 Wall. 36 (1873).

[6] Van Alstyne & Karst, State Action, 14 Stan. L. Rev. 3, 4 (1961).

[7] Id. at 7.

protection requirements exist for different reasons:

> These verbal formulations are simply an awkward shorthand to describe a multiplicity of interests which compete for respect in each case. Among these interests are several which are functionally related to the presence or absence of participation by a government in the alleged constitutional invasion. Thus while the search for a merely formal connection--for "state action"--is misleading, the search for the values which stand behind the state action limitation is indispensable.[8]

Among the values implicit in the framing of the fourteenth amendment were, according to another commentator, not only protection against arbitrary government action--a key element of due process--but also "pluralism, individual autonomy, prerogatives of private property, and free and natural adjustment" by society to the inevitable changing of circumstances.[9] Consideration of such a number of different values indicative of interests, and choosing among competing values lead logically to balancing of those interests in light of the facts of specific cases. Not surprisingly, then, the jurisprudential perspective generative of clearest insight is that of policy.

Value choosing becomes interest balancing. Interest balancing writ large is policy making. Among the variables

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[8] Id.

[9] Note, State Action: Theories for Applying Constitutional Restrictions to Private Activity, 74 Colum. L. Rev. 656 (1974).

weighed in the balancing and thus determinative of policy via state action analysis are degree of government involvement, offensiveness of the conduct, and, notably, the value of "preserving a private sector free from the constitutional requirements applicable to government institutions."[10]

Governmental involvement, then, does not automatically bring constitutional restraints to bear upon private individuals "absent some policy reason why certain types of involvement should carry along constitutional restrictions."[11] Policy is the key.

Judicial devices analogous to state action and also representative of policy making have long existed in the law. Courts are not always reluctant to "look beyond the facade of a particular activity or institution for purposes of examining its actual components."[12] Conduct lawful on its face may by such scrutiny be held unlawful.

Courts, for example, can "pierce the corporate veil" to determine whether a corporation is being used for illegal purposes or fraudulent activities. Another example of this type of judicial device involves land use controls. Courts can "pierce" the facade resulting from the enacted

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[10]Wahba v. N.Y.U., 492 F.2d 96, 102 (2d Cir. 1974).

[11]Note, supra note 9, at 659.

[12]Note, Student Due Process in the Private University: The State Action Doctrine, 20 Syr. L. Rev. 911, 914 (1969).

and official definition of a particular use, and scrutinize the nature of the actual activity to decide whether it is in fact in accordance with the zoning ordinance applicable to it.[13] A final example, more closely related to state action conceptually, is sovereign immunity from tort liability. Courts allow piercing of the shield of immunity if the activity is found to be proprietary rather than governmental in character.[14]

The Meaning of State Action: Theories

Faced with a welter of cases involving the threshold issue of finding state action, commentators have proposed various theories both to explain otherwise irreconcilable case holdings and to offer analytical frameworks designed to foster consistency in future state action cases. One theory is predicated upon formal ties between an ostensibly nonpublic institution and the state, ties such as financial aid or certification. State action would be one consequence of such ties.[15] A second asserts that even formal ties would not give rise to state action unless the institutional purpose of the ostensibly nonpublic entity could be

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[13] Id.

[14] K. Alexander, R. Corns, & W. McCann, Public School Law 356 (1969).

[15] O'Neil, Private Universities and Public Law, 19 Buff. L. Rev. 155, 156 (1969).

characterized as public.[16] A third set of theories advances the proposition of interest balancing, whereby the interests and rights denied a person would be balanced against the interests of the nonpublic entity.[17] As indicated earlier, value choosing and consideration of policy are inherent in such theories.

The policy consideration may be inherent in the interest balancing approach, but such a concern, though overriding, is often unstated. One commentator noted:

> There is a need to maintain the constitutional integrity of government resources, to protect against misuse by private persons of powers or aid received from government, and to protect against use by government of private individuals to accomplish government objectives without constitutional restraint. . . . The problem of defining the line between "state" and "private" action may indeed be one of balancing these constitutional interests against the interest of private persons in freedom of choice and use of property.[18]

Other scholarly opinion can be seen as converging to varying degrees upon these ideas. One commentator embraced the balancing approach, weighing the nonpublic party's rights of property, privacy, association, and liberty of

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[16]Lewis, The Meaning of State Action, 60 Colum. L. Rev. 1083 (1960).

[17]See Horowitz, The Misleading Search for "State Action" Under the Fourteenth Amendment, 30 So. Cal. L. Rev. 208 (1957).

[18]Note, supra note 9, at 656-57 (footnotes omitted).

action against the interest of the victim in not having the state support denial of his own rights.[19] It is worthy of note that these listed rights of the nonpublic party coincide with those protected by the due process clause.

More simply, perhaps courts should find state action only after weighing the private interest in particular discrimination or activity against the public interest in the elimination of that discrimination or activity.[20] More comprehensively, perhaps courts should find state action as a matter of course whenever it is the threshold issue, and then limit the effects of such a finding through other doctrines or identification of other interests.[21]

One result of an extension such as the latter could be the finding of state action in certain circumstances in which the state had a duty to act, but did not; the state's inaction, then, would amount to state action.[22] This may be appropriate in situations involving deprivation of voting or other fundamental rights,[23] but generally not:

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[19]Henkin, Shelley v. Kraemer: Notes for a Revised Opinion, 110 U. Pa. L. Rev. 473 (1962).

[20]Williams, The Twilight of State Action, 41 Texas L. Rev. 347 (1963).

[21]Black, Foreword: "State Action," Equal Protection and California's Proposition 14, 81 Harv. L. Rev. 69 (1967).

[22]J.N. Story & L. Ward, supra note 2, at 107.

[23]Terry v. Adams, 345 U.S. 461 (1953).

> If private action has resulted in a general and serious denial of values the amendment was meant to protect, an answer that the state has merely failed to prevent this will not suffice.[24]

The Meaning of State Action: Other Considerations

In order to deal with any case, a court of law must have jurisdiction and the case must be justiciable. These are terms of art, as state action is a term of the legal art. Similarly, just as a judicial finding of state action is the condition precedent to application of the fourteenth amendment, the court having competent jurisdiction and the case being justiciable are conditions precedent to the operation of the adjudicatory machinery itself. This is important because "the practical value of a constitutional right is no greater than the procedure which exists to vindicate it."[25]

State judicial systems include courts of general jurisdiction which can hear cases with issues that arise from a large range of questions dealing with legal substance and procedure. As long as there is an alleged injury to relieve or a claimed right to declare, the case will be one which

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[24] Friendly, The Dartmouth College Case and the Public-Private Penumbra, 12 Texas Q. 1, 18 (Supp. 1971).

[25] 1 T. Emerson, D. Haber, & N. Dorsen, Political and Civil Rights in the United States 474 (Supp. 1973).

can be adjudicated, one that is justiciable. This allows adjudication of federal fourteenth amendment issues as well as those deriving from alternative state law permitting alternative remedies.[26]

The federal judicial system, however, is subject to the limitations of Article III of the Constitution, restricting federal court jurisdiction to "cases" and "controversies." The article further grants Congress power to circumscribe or clarify the judicial power. One statute made thereunder is 28 U.S.C. §1343(3), which establishes specific jurisdiction for fourteenth amendment cases:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens of all persons within the jurisdiction of the United States.

The "under color of any state law" phrase is generally considered equivalent to state action under the fourteenth amendment,[27] and appears both in this jurisdictional statute and in the substantive statute often used in conjunction with it, 42 U.S.C. §1983, discussed in Chapter III.

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[26] Rendleman, The New Due Process: Rights and Remedies, 63 Ky. L. J. 531, 671 (1975).

[27] Note, supra note 9, at 656 n.4. But see Rendleman, supra note 26, at 671.

After statutory federal question jurisdictional requirements are met, the cases and controversies limitation blends into a question of the justiciability of the particular case or controversy. Justiciability reflects a dual limitation upon federal court jurisdiction. First, questions must be presented to a federal court in an adversary context and in a form viewed historically as amenable to resolution by the courts. Second, considerations of the separation of powers among the federal government's three branches dictates that the question presented be a legal, not a political question.[28]

With justiciability lies the question of standing. The focus is upon the party seeking to get his complaint before a court rather than upon the issues or merits of the complaint. "The law of standing is designed to limit the class of persons who are eligible to trigger the process of judicial review."[29] The party must allege a personal stake in the outcome of the case. The rationale is the need for genuine adverseness to sharpen and clarify the legal issues, the contentiousness necessary to keep adjudication within the confines of the adversary process at the heart of Anglo-American law.[30] Even so, standing is usually an issue only

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[28] Flast v. Cohen, 392 U.S. 83 (1968).

[29] 1 T. Emerson, D. Haber, & N. Dorsen, supra note 25, at 474.

[30] Flast v. Cohen, 392 U.S. 83 (1968); Roe v. Wade, 410 U.S. 113 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972).

in federal court cases, the test being whether the interest the plaintiff seeks to protect is arguably within the zone of interests protected or regulated by the statute or constitutional provision in question; state courts typically follow the more direct test of injury in fact, a test some see as replacing the zone test in federal courts.[31]

A related restriction is ripeness. Ripeness requires that a controversy proceed to a point where court adjudication is appropriate before judicial machinery is called into action. Cases or controversies must be real, present, or imminent, not abstract, hypothetical, or remote.[32]

Although ripeness is sometimes an issue when federal or state courts are asked to hear cases appealed from administrative agencies such as school boards and college boards of trustees, two other limitations derive from administrative law. These are primary jurisdiction and exhaustion of administrative remedies. The former determines which of two tribunals, the court or the agency, both having jurisdiction, should act first; the latter governs the timing of judicial review of administrative action. Both doctrines exist to coordinate the workings of judicial and quasi-judicial bodies, but exhaustion is the more important because it requires that all levels of appeal be taken

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[31] K.C. Davis, Administrative Law and Government 72-80 (1975).

[32] Id. at 81; Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).

within the administrative structure itself before appeal to a court is made. It should be noted, however, that those who seek relief under 42 U.S.C. §1983 are not bound by the exhaustion requirement if their constitutional challenge is sufficiently substantial.[33]

Another jurisprudential consideration appropriate here is that of remedies. The foregoing discussion would be meaningless were it not for the possibility of relief for a plaintiff; the remedy question is generally foremost in the minds of plaintiffs and central to the dispute- and conflict-resolution purposes of courts.

Conceptually, two basic remedy patterns may be found in state action cases. The first is found when suit is brought against the state to enjoin its connection with or support of the challenged public or ostensibly nonpublic activity. The second is found in suits brought to enjoin the challenged activity itself. These patterns are closely related to the categories of state action cases, the focus of Chapter III.

In either pattern a finding of state action would provide a federal court the necessary jurisdiction for the framing of an appropriate remedy. Ostensibly nonpublic activity, however, is rarely enjoined; severance of state

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[33] K.C. Davis, supra note 31, at 84-95; Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 50 (1938); King v. Smith, 392 U.S. 309 (1968).

involvement in such activity is usually ordered.[34] This is the usual remedy even if the complaint has requested specific injunctive relief against the nonpublic activity found to be state action.[35] The choice of relief has important consequences:

> Once the severance remedy has been effected, state involvement as a basis for state action can no longer be said to exist, the private actor is regarded as totally independent, and no injunctive relief is ordered against the practices of the private institution itself.[36]

In order to gain injunctive relief against the nonpublic activity and entity involved, the plaintiff must show not just state involvement; such an unusually high degree of involvement must exist that the state be found to have become a "partner" or "joint venturer" in the otherwise nonpublic activity.[37] This remedy is especially appropriate in cases wherein the ostensibly nonpublic entity is performing a public function with sufficient attributes of sovereignty to be deemed engaged in a special form of state action.

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[34]Antoun, State Action: Judicial Perpetuation of the State/Private Distinction, 2 Ohio No. U. L. Rev. 722, 725 (1975).

[35]Id.

[36]Id.

[37]Id.

A caveat is in order, however. In certain situations where a finding of "joint venturer" is warranted and enjoining of the activity theoretically appropriate, other constitutional provisions prevent such relief.[38] Severance is thus the remedy in cases involving aid to parochial schools. The Supreme Court has chosen in such cases to focus not upon state action per se, but upon provisions of the first amendment, the establishment clause in particular, as incorporated into the fourteenth amendment's due process clause.[39]

This incorporation will be discussed in detail in Chapter IV, but it should be noted here that state action contravening such incorporated proscriptions cannot stand. The focus in such cases is whether aid "establishes" religion rather than whether the state's involvement transforms otherwise clearly nonpublic conduct into public conduct as a matter of fact and law. Moreover, enjoining the private activity itself would seem a direct contravention of the right of private schools to exist,[40] or at least inconsistent with first amendment free exercise of religion.[41]

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[38] Id. at 726.

[39] Id.

[40] Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[41] Note, supra note 9, at 702 n.281.

The final consideration reflects in a more contextual way the conceptual nuances of state action. State action may arise not only in nonpublic educational institutions, but also in private associations related to education. Thus, the National Collegiate Athletic Association (NCAA) can be viewed as engaging in state action, and thus be required to provide equal protection and due process to affected students, because of its relationship with public institutions.[42] Similarly, other nonpublic organizations such as Educational Testing Service and the College Entrance Examination Board, private agencies neither politically responsible nor formally accountable to the public, wield great power over students of both public and nonpublic institutions;[43] state action can be argued.

These kinds of issues blend into the contextual realm. Perhaps the most helpful approach to contextual investigation is through the categorization of cases, the primary focus of Chapter III.

Summary

Conceptual perspective on state action begins with recognition that state action is a judicially created, but

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[42]Martin, supra note 4, at 393; cf. Buckton v. NCAA, 366 F. Supp. 1152 (D. Mass. 1973).

[43]Cohen, Reforming School Politics, 48 Harv. Ed. Rev. 429, 431 (1978).

difficult to define, legal concept derived directly from the fourteenth amendment. Implicit in state action analysis under any of several theories are the underlying policy considerations of values and interests relative to the extent to which federal constitutional restrictions are and should be a hedge upon private actions. Before a court can address the threshold issue of state action in any case, much less afford a remedy, it must have jurisdiction and the case must be justiciable.

CHAPTER III

STATE ACTION: CONTEXTUAL PERSPECTIVE

Introduction

State action is, as noted, a legal concept. Just as administrative theory is tested and fleshed out by being put into practice, so too do legal concepts acquire substance by being applied in concrete situations. Full understanding of the state action concept can be achieved only through such contextual perspective. Judicial redefinition of state action, furthermore, can be discerned only through this focus.

The Operation of State Action: State Action Categories

The major contextual issue in state action cases is whether the court can discern sufficient connection between the nonpublic activity in each case and a state to support a finding of state action as a matter of fact. Judicial resolution of this basic issue is perhaps best seen in terms of several categories of state action cases.

At a level of abstraction at once high enough to provide further conceptual insight into judicial definition of

state action and low enough to indicate the types of factual situations that affect that definition contextually through the concrete operation of courts, four primary categories of state action cases may be identified. The first reflects cases wherein the state acts directly, the kind of "state action" the plain meaning of the words of the fourteenth amendment denotes. The second reflects those cases wherein the state is significantly involved in some otherwise private or nonpublic activity. The third reflects cases wherein a private entity performs a public function. The fourth reflects cases wherein custom may give rise to state action claims via the Civil Rights Act of 1871, 42 U.S.C. §1983.

Direct State Action

The fourteenth amendment was, not illogically, first applied to clearly governmental actions taken by instrumentalities of state governments. Though some commentators would limit the state action concept to application to ostensibly nonpublic activities, and therefore call "state action" a "misnomer,"[1] the literal meaning of the term cannot be ignored. This first category of state action cases, then, reflects cases that were first both logically and chronologically.

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[1] O'Neil, Private Universities and Public Law, 19 Buff. L. Rev. 155, 168 (1969).

The Civil Rights Cases[2] forced the Supreme Court to grapple with the incipient state action problem. There the Court embraced a public/private distinction, the majority contending that private parties are inherently incapable of denying other private parties their constitutional rights. Recognizing that private parties could perpetrate private wrongs upon their fellow citizens, the Court viewed these as mere assaults. Such assaults could deter the exercise of a right, but would not thereby become unconstitutional.

Justice Harlan dissented, rejecting the public/private distinction upon which the majority reasoning depended. His alternative rationale evinced high regard for what he perceived as the purpose of the fourteenth amendment. Since he identified that purpose to be the elimination of wrongs committed against black Americans, he did not deem the particular words of the amendment literally controlling. This particular "plain meaning, plus" view has never been embraced by a majority of the Court, and had repeatedly been rejected prior to Harlan's dissent.[3]

It should be noted that one policy basis of the majority opinion was fear of expansion of federal power, a fear "no longer a primary influence in the state action

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[2]109 U.S. 3 (1883).

[3]See United States v. Harris, 106 U.S. 629 (1882); United States v. Cruikshank, 92 U.S. 542 (1875).

inquiries."[4] At the time, however, judges were mindful that prior to the fourteenth amendment, "there were very few constitutional restraints on the actions of the states."[5] The fundamental issue was the striking of a practicable balance among the powers and protections of the federal government, the states, and the people. This issue will be further explored in Chapter IV.

Legislative state action is perhaps the purest form of direct state action. The landmark case in the area is Plessy v. Ferguson.[6] There the Supreme Court held that a Louisiana statute segregating railroad passengers by race did not constitute unreasonable discrimination under the fourteenth amendment's equal protection clause if the accommodations, though separate, were equal. De jure racial segregation, being thus sanctioned by the highest court in the land, became deeply embedded in the southern and border states. In no sphere of direct governmental activity was this more apparent than in public educational institutions at all levels.

The assault upon de jure racial segregation was conducted primarily in the federal judicial arena, with states

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[4]Note, Legislative State Action and Indiana Private Universities, 9 Val. L. Rev. 611, 612 n.4 (1975).

[5]A. Morris, The Constitution and American Education 45 (1974).

[6]163 U.S. 537 (1896).

usually trying to defend their educational segregation in the face of the fourteenth amendment's equal protection clause. The precedential force of Plessy began to weaken in the higher education cases,[7] setting the battleground for the most critical clash of all.

The watershed case for legislative state action and equal protection in public education was Brown v. Board of Education.[8] The year was 1954. A unanimous Supreme Court, in an opinion written by Chief Justice Earl Warren, declared that separate educational facilities were inherently unequal. Those school systems established pursuant to de jure segregation policies operated in violation of the equal protection clause.

Due process cases, discussed in Chapter V, are also found in this direct state action category. These generally deal with situations in which the actor, while not the legislature itself, is still a governmental instrumentality. Municipal corporations and state universities, for example, are recipients of a quantum of sovereignty by delegation from the legislature or through the state constitution. The threshold state action issue in such cases, as in all cases

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[7]Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938); Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Okla. State Regents, 339 U.S. 637 (1950). But see Berea College v. Commonwealth of Ky., 211 U.S. 45 (1908).

[8]347 U.S. 483 (1954).

of this first category, is quickly resolved on its face, allowing the court to reach the merits of the particular controversy.

State Involvement

The threshold state action issue is never so simple in cases where the state is involved in otherwise nonpublic activity. The question becomes one of degree, with focus upon whether the state is sufficiently connected with the otherwise nonpublic activity to warrant state action inquiry. The connection sought varies, of course, with the case, but gives rise to three involvement subcategories. These, discussed separately below, reflect cases wherein the state was in affirmative privity with the otherwise nonpublic activity, cases wherein state regulation provided the nexus between the state and the activity, and cases wherein state aid provided that nexus.

Though the subcategories are conceptually severable, in most cases the plaintiff averred the existence of state action by a combination theory of involvement. However, one commentator noted that:

> Although each type of involvement may be cumulated to satisfy the state action requirement, a recent decision indicates that the Court is unwilling to find state action where no one theory advanced is independently persuasive. This is especially true where, after reciting and combining all state connections, there is still no showing that the state is

> sufficiently involved in the particular challenged private activity.[9]

This posture perhaps runs counter to education cases imputing state action to the National Collegiate Athletic Association (NCAA), a "private and voluntary unincorporated association comprising the majority of American four-year colleges and universities with athletic programs."[10] Courts in these cases generally combined notions of public function and financial support through payment of dues by public institutions in order to find state action; neither notion standing alone was deemed sufficient.[11] Such combination cuts across this second category of state involvement and the third category, discussed below, of public function, but is still combination entailing involvement in part.

State affirmative privity

The involvement subcategory of state affirmative privity reflects several landmark cases, and demonstrates

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[9]Antoun, State Action: Judicial Perpetuation of the State/Private Distinction, 2 Ohio No. U. L. Rev. 722, 729-30 (1975) (footnotes omitted); see Jackson v. Metropolitan Edison, 419 U.S. 345 (1974).

[10]Note, The Student-Athlete and the National Collegiate Athletic Association: The Need for a Prima Facie Tort Doctrine, 9 Suff. L. Rev. 1340, 1342 (1975).

[11]See Parish v. NCAA, 506 F.2d 1028 (5th Cir. 1975); High School Athletic Ass'n v. St. Augustine H.S., 396 F.2d 224 (5th Cir. 1968).

conceptually important judicial approaches to the issue of state action. A variety of types of cases is subsumed in this classification.

When the state creates a business monopoly, the question of applicability of fourteenth amendment restrictions to the entity arises. An extreme example of this kind of affirmative privity exists when the state not only creates a public utility that is privately owned, but grants it one of the trappings of sovereignty, the power of eminent domain. Several United States Courts of Appeals have held that a state grant of monopoly power constituted state action,[12] but others have held that other factors must also be considered in the search for state action.[13] The Supreme Court finally resolved the conflict.

The Court, in Jackson v. Metropolitan Edison,[14] held that upon the facts of the case the grant of state regulated and state protected monopoly power to the electric company defendant did not ipso facto give rise to state action. Equally important, the Court noted that the specific challenged activity itself must have been brought about by the state grant of power, or at least must have been involved

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[12] See Lovoie v. Bigwood, 457 F.2d 7 (1st Cir. 1972).

[13] See Particular Cleaners, Inc. v. Commonwealth Edison Co., 457 F.2d 189 (7th Cir. 1972).

[14] 419 U.S. 345 (1974).

with the grant, for state action to arise.[15] This point recurs in state action cases, particularly those of the involvement category.

Grants of power and rights other than monopoly power are also made by states as a matter of course. A state may by statute acquiesce in a private right recognized at common law, or it may officially expand common law rights. State action is not likely to be found in the acquiescence situation, but could be found in the expansion situation.[16]

The case of Reitman v. Mulkey[17] served to clarify the distinction. Involved was a California constitutional amendment which, when ratified, annulled the state's fair housing statutes. Specifically, it protected a property owner's right to refuse to lease or sell his home for any reason. A homeowner could thus refuse to sell his home to a prospective buyer simply because of the latter's race. The Supreme Court found this legitimizing of discrimination to constitute state action.

Reitman could be included in the first category of direct state action cases, but the better focus is upon the amendment's relationship to otherwise private discriminatory

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[15] See Railway Employees Dept. v. Hanson, 351 U.S. 225 (1956).

[16] Antoun, supra note 9, at 733.

[17] 387 U.S. 369 (1967).

behavior. Thus,

> From a reading of Reitman it does not appear that the absolute power granted to private citizens need be the sole cause of the challenged activity in racial discrimination cases. It is probably sufficient to show that the protected status of the right encouraged its unquestioned exercise.[18]

It was the "commingling of state authorization with the private act of discrimination"[19] that created the state action in ostensibly private conduct.

A related type of situation is found in the "agency" case[20] wherein the state encourages certain private activities to advance state policy. Thus state action could arise from a contractual arrangement whereby a non-public educational institution provides programs for the state.[21]

The state may case itself in affirmative privity with otherwise private activities in ways other than by legislative or constitutional power grants. Judicial enforcement of private rights posits similar state action questions. In

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[18]Antoun, supra note 9, at 733.

[19]Note, supra note 4, at 620.

[20]Note, State Action: Theories for Applying Constitutional Restrictions to Private Activity, 74 Colum. L. Rev. 656, 680-85 (1974).

[21]Hendrickson, "State Action" and Private Higher Education, 2 J. Law & Ed. 53, 62 (1973).

Shelley v. Kraemer,[22] land owners sued to set aside sale of another's property to blacks in violation of racially restrictive covenants running with the land. The Supreme Court conceded that the restrictive covenants involved and voluntary adherence to them were not illegal per se. Such covenants could not be judicially enforced, however, because private discrimination would then become so closely connected with the state that it would become state action. As in Reitman, the balancing of interests in property and nondiscrimination was crucial to the determination of the threshold state action issue. Similar balances were struck in education cases for which Shelley provided precedent.[23]

The leading case of affirmative state privity, one of the leading state action cases generally, was Burton v. Wilmington Parking Authority.[24] There the Authority, a state agency, erected and controlled a public parking building. To generate additional income, the Authority leased part of the premises to a restaurant proprietor whose

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[22]334 U.S. 1 (1948); cf. Evans v. Abney, 396 U.S. 435 (1970).

[23]See Commonwealth of Pa. v. Bd. of Directors of City of Phila., 353 U.S. 230 (1957); Girard College Trusteeship, 391 Pa. 434 (1958); Commonwealth of Pa. v. Brown, 392 F.2d 12 (3rd Cir. 1968); Coffee v. William Marsh Rice University, 408 S.W.2d 269 (1966); Sweet Briar Inst. v. Button, 280 F. Supp. 312 (1967).

[24]365 U.S. 715 (1961).

business practices included refusing to serve blacks. The Supreme Court formulated a test of cumulative contacts between the state and the activity, finding state action in the discrimination. Context is the key to the test, which retains its vitality despite, as noted earlier, Jackson, a power grant case. How can cumulative contacts be ascertained?

> Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.[25]

Applying this test, the Court found a mutually beneficial relationship existing between the state and the ostensibly private discriminating party. The remedy afforded was the granting of an injunction prohibiting discrimination in the restaurant. This, it should be noted, is an example of the rarely granted relief of restraining the ostensibly private activity itself. Such "partnerships" or "joint ventures" as the Court found in Burton are the ultimate cases in affirmative privity, because by definition the state has to some significant extent become involved in the ostensibly private activity.

In Gilmore v. City of Montgomery,[26] the issue was whether the city's policy of allowing use of its recreational

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[25] Id. at 722.

[26] 417 U.S. 556 (1974).

facilities by segregated nonpublic schools and groups affiliated therewith constituted state action. The Court stated the issue as "whether there is significant state involvement in the private discrimination alleged,"[27] a question of fact for the District Court to address under the Burton test. In what was arguably a state aid case, the Court chose to analogize to Burton rather than to follow the approach of the state aid cases discussed below as representative of the third involvement subcategory.

State regulation

Since nearly all forms of private activity are regulated to some degree by the state under its police power, the statement in Burton limiting state action to those activities to which state contacts were significant is particularly meaningful in cases of the state regulation subcategory. The judicial test in such cases asks whether "substantial" regulations involve the challenged activity.[28]

One test of substantiality is whether the regulation in question fosters or encourages the challenged activity. Such a test is reminiscent of some of the affirmative privity cases of the first involvement subcategory, and may be considered as having similar limitations: "regulation

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[27] Id. at 573.

[28] Antoun, supra note 9, at 730.

which falls short of fostering or approving the challenged activity will rarely be considered state action."[29] The test was used by the Court in the most recent regulation case of note, Moose Lodge Number 107 v. Irvis.[30] There the Court deemed liquor licensing insufficient involvement to give rise to state action.

Unlike the affirmative privity relationship, state regulation, even initial incorporation or chartering under state law, restricts rather than supports private activity. The interest balancing and thus the policies undergirding the power grant, agency, and judicial enforcement cases are inapplicable to regulation cases.[31] Furthermore,

> Perhaps because courts have not analyzed the meaning of government involvement through regulation, they have failed to develop any apparent policy bases for presuming constitutional involvement upon regulation.[32]

However slippery the policy footing in the regulation cases, it is clear that more than mere regulation is needed in order to impute state action. State regulation of private educational institutions' curricula or educational

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[29] Id.

[30] 407 U.S. 163 (1972); see CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

[31] Note, supra note 20, at 685.

[32] Id. at 689.

standards is thus an insufficient foundation upon which to base state action claims. Statewide coordinating and planning, or "1202" commissions, as well as master plans themselves for all higher education within a state similarly lack the required substantiality.[33]

State aid

State aid is frequently cited as triggering state action through state involvement in otherwise private activity. State aid differs from power grants in that aid neither creates nor increases the power base of the non-public entity involved, but rather "assists in the exercise of that power."[34] A dual test emerges:

> In resolving state action cases based upon state aid, the judiciary must determine whether the state is involved in a private aid program to some significant degree, and whether the state through its aid program is involved in or fostering the challenged activity.[35]

In a related but essentially different type of case, Norwood v. Harrison,[36] the state was prohibited from loaning textbooks to racially discriminatory private schools. The

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[33] Hendrickson, supra note 21, at 69.

[34] Antoun, supra note 9, at 734. See also Hammond v. U. of Tampa, 344 F.2d 951 (5th Cir. 1965).

[35] Id.

[36] 413 U.S. 455 (1970).

Court focused upon the fostering of discriminatory activity and expressly rejected any analogy to permissible state loans of secular textbooks to parochial school pupils.

One form of aid which may not be obvious is tax exemption. In Griffin v. County School Board of Prince Edward County,[37] tax exemption was held to constitute both state aid and state action, so that the grant of exemption to racially discriminatory schools to avoid desegregation was enjoined. The landmark Walz case,[38] upholding tax exemptions for religious organizations, seemed to foster cases "deemphasizing the significance of aid via tax exemptions."[39]

A recent Court of Appeals case would seem to deny such residual effect of Walz, however. In Jackson v. Statler Foundation,[40] the court was faced with a suit brought by a black minister against charitable foundations alleging racial discrimination. The majority declared that private tax exempt foundations are so "entwined" with the state that their activities may often constitute state action.

State action in such cases would be found if such foundations were substantially dependent upon their tax

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[37]377 U.S. 218 (1964).

[38]Walz v. Tax Comm'r, 397 U.S. 664 (1970).

[39]Note, supra note 20, at 676.

[40]496 F.2d 623 (2d Cir. 1974).

exempt status, the regulatory scheme was detailed and intrusive with connotations of state approval, and the foundation served, as most do, a public function. At least one commentator saw this case as a direct threat to the public/private dictum of the Dartmouth College case, discussed in Chapter V as a legal basis for nonpublic education in the United States. The Jackson rationale was seen as a threat to institutional autonomy in nonpublic educational institutions through the "ubiquitous" character it lent the state action doctrine.[41]

The Bob Jones University case[42] dealt with the same basic issue specifically in the context of a nonpublic educational institution. The tax exemption had been granted by the federal government rather than by a state, but the consequences flowing from the rationale are not logically severable on federal/state grounds. Thus, even though the case was not a fourteenth amendment case and state action was not an issue, future tax exemption cases involving states could reflect Bob Jones as precedent.

The Supreme Court decided the case on a procedural point of federal income tax law but essentially upheld revised Internal Revenue Service guidelines denying tax

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[41]Note, Private Universities: The Right to be Different, 11 Tulsa L. J. 58 (1975).

[42]Bob Jones U. v. Connally, 416 U.S. 725 (1974).

exempt status to nonpublic educational institutions without racially neutral admissions policies. The second edge of this double-edged sword is that charitable donors and contributors to racially discriminating institutions would then be disallowed deductions for their donations and contributions. The practical financial effect of this is thus also two-edged: not only will such institutions have to pay corporate income taxes never paid before, but also extra-institutional sources of income would in all likelihood dry up. Administrators in such an institution would be placed in a double financial bind.

It remains to be seen the extent to which state tax exempt status accorded nonpublic educational institutions will change. Other types of state aid, as shown, can also lead to state action; the point remains, however, that the usual forms of state aid in the usual amounts are not enough to create state action.

Public Function

Public function cases constitute the third category. Unlike the first two categories, no state involvement, direct or indirect, need be found in these. The essence of the public function concept is that a nonpublic entity may by its activities perform a service "so public in nature that it must be treated as a surrogate of the state for

fourteenth amendment purposes."[43] That is, the nonpublic activity must involve those functions usually performed by the state.

As will be noted in Chapter V, dictum in the Dartmouth College case had it that higher education was essentially a private endeavor. If given continued vitality, this would seem to preclude this category of state action cases from applying to nonpublic educational institutions of higher education. It can be said, however, that education itself is a public function. Moreover,

> The university today, whether private or state, has come to be a quasi-public institution in which the needs of public service, as defined by the role of the research endeavor (whether initiated by the government or by the faculties), becomes paramount in the activities of the university.[44]

This specific question will be addressed following discussion of the landmark public function case, Marsh v. Alabama.[45]

In Marsh a company town which performed municipal services as any other town attempted to prevent distribution of religious literature on its sidewalks. Although the town was in fact private property, the Court held that its

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[43] Antoun, supra note 9, at 735.

[44] D. Bell, The Reforming of General Education 88 (1966).

[45] 362 U.S. 501 (1946).

citizens had a right to free channels of communication. Since a de jure municipality could not so infringe upon such a right because of fourteenth amendment incorporation of the first amendment freedom of speech through the due process clause, neither could this de facto municipality. The company town was, for fourteenth amendment purposes, the functional equivalent of a state municipality and therefore shared the constitutional restrictions with the latter.

Though expanded in scope temporarily,[46] the Marsh rationale has returned to its original narrow strictures.[47] Nevertheless,

> Prior to Marsh the rule was clear: if a governmental unit acted there was state action, otherwise there was not. But the line between a governmental and a private entity became blurred in Marsh, as the private entity began performing quasi-governmental functions. In our mixed public-private economy that blur has been spreading. . . . To what extent should the private right to be arbitrary and unreasonable be permitted, to what extent should it be checked? This is the knotty problem with which the state action doctrine deals.[48]

In regard to nonpublic educational institutions, this problem is knotty indeed. One equal protection case of

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[46] Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968).

[47] See Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); Hudgens v. NLRB, 424 U.S. 507 (1976).

[48] J.N. Story & L. Ward, Perspectives of American Law 105 (1974).

note adopted the Marsh rationale in imputing state action to an ostensibly nonpublic educational institution, but though carefully reasoned and eloquently expressed, the opinion proved to have little precedential effect.[49] One subsequent case did speak of a private university's performance of a public function as possibly amounting to state action when, by failing to keep order, it prevented students from participation in the education process.[50] Appellate courts, perhaps mindful of the Dartmouth College case dictum that higher education is a private endeavor, have yet to apply the Marsh rationale to nonpublic educational institutions.

Dictum in another case related both to education and to the question of remedy in public function cases. Though the remedy in such cases would be an injunction against the nonpublic activity itself,[51] Evans v. Newton[52] cautioned that some governmental-type functions could be so enjoined, while others could not. Parks could be enjoined, for example, from discriminating on the basis of race, but nonpublic schools would not give rise to state action

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[49]Guillory v. Administrators of Tulane U., 203 F. Supp. 855 (E.D. La. 1962).

[50]Belk v. Chancellor of Washington U., 336 F. Supp. 45 (E.D. Mo. 1970).

[51]Antoun, supra note 9, at 736.

[52]383 U.S. 296 (1966).

prerequisite to such an injunction. As dictum, this distinction is not binding upon courts in the future.

Although as a matter of legal mechanics the leading public function cases focused upon the balancing of rights and interests, a more basic policy justification underlies the applying of fourteenth amendment restrictions to ostensibly nonpublic entities via state action:

> Private persons who possess power to significantly deprive a general community of rights protected by the Constitution against state infringement possess powers equivalent to those of government. Such private persons and those exercising peculiarly governmental functions threaten these rights as effectively as government itself. Thus, the purposes for which the constitutional amendments were ratified justify imposing restraints on the parties who wield such powers. Moreover, relevant constitutional amendments may be regarded as limitations not merely upon government, but upon governmental powers generally.[53]

42 U.S.C. §1983 Custom Cases

Custom cases, arising not only procedurally through but also literally because of the Civil Rights Act of 1871, 42 U.S.C. §1983, constitute the fourth category of state action cases. The rationale in these cases is that the restrictions of the fourteenth amendment may extend to "reach private practices which are so uniform throughout a

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[53]Note, supra note 20, at 691.

community or state as to have the practical effect of law."[54] As with public function cases, custom cases do not require direct state involvement of the second category type and likewise may afford injunctive relief against the private party itself.[55]

The notion of custom "having the force of law" and being state action as a consequence became judicial precedent in the Civil Rights Cases.[56] The statutory underpinning therefore was the "statutory enforcement provision of the fourteenth amendment"[57] embodied in 42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[58]

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[54] Antoun, supra note 9, at 736.

[55] Id.

[56] 109 U.S. 3 (1883).

[57] Antoun, supra note 9, at 737.

[58] 42 U.S.C. §1983 (1970) (emphasis added).

Regardless of category, most state action cases arise as suits in equity[59] under that statute.[60] Many specific education cases have arisen thereunder. As noted earlier, jurisdiction is supplied by 28 U.S.C. §1343(3). Since custom category cases are particularly dependent upon the existence and wording of §1983, discussion of it is in order.

Monroe v. Pape[61] established unquestioned federal jurisdiction over state action cases under both statutes without regard to citizenship or jurisdictional amount. The Court pointed out that liability under §1983 runs only against "persons," a term not including municipal corporations. The problem complicating the issue was the eleventh amendment immunity of states to suits in federal courts, compounded by the "official/person dichotomy" characterizing the dual legal nature of people who are state officials.[62] Later in City of Kenosha v. Bruno,[63] the Court ruled that municipal corporations, and by implication other governmental entities such as school boards, were not "persons" within the meaning of the statute even if only injunctive relief and no money damages were sought.

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[59]La Morte, The Fourteenth Amendment: Its Significance for Public School Educators, 10 Ed. Admin. Q. 1 (Autumn 1974).

[60]Note, supra note 20, at 656 n.4.

[61]365 U.S. 167 (1961).

[62]Rendleman, The New Due Process: Rights and Remedies, 63 Ky. L. J. 531, 578 (1975).

[63]412 U.S. 507 (1973).

These two cases were overruled in a recent case[64] holding that municipalities and other local government units were "persons" under the statute after all, thus were not entitled to absolute immunity from liability under it. The scope of that immunity which remains may be similar to the good faith standard applied to school board members in Wood v. Strickland,[65] but at present the issue is undecided.

In a recent education case, Carey v. Piphus,[66] the Court noted that damages cannot be presumed when the required procedural due process is denied prior to a pupil suspension. Denial of the process is, as discussed in Chapter IV, a constitutional violation, but will warrant only nominal damages absent proof of actual injury.

Judicial resolution of the jurisdictional and remedial problems of §1983 has not been fully achieved and is thus subject to change. In view of the trend toward limiting federal jurisdiction under the statute,[67] and narrowly circumscribing remedies thereunder, care should be taken by plaintiffs both to "name the official in question as a defendant"[68] and to prove actual damages.

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[64] Monell v. Dept. of Social Servs. of City of N.Y., 436 U.S. 658 (1978).

[65] 420 U.S. 308 (1975).

[66] 435 U.S. 247 (1978).

[67] Rendleman, supra note 62, at 671.

[68] 1 T. Emerson, D. Haber, & N. Dorsen, Political and Civil Rights in the United States 492 (Supp. 1973).

What kind of cases arise under the "custom or usage" language of 42 U.S.C. §1983? The leading case in this fourth category is Adickes v. S.H. Kress and Company.[69] There the Supreme Court struck a public/private distinction note, pointing out that custom practiced only by private parties does not have the force of law. This served to limit severely the custom category of state action cases.

The present rule in custom cases is that the custom or usage, in order to give rise to state action, need not be mandated or prescribed by formal state law, but it must be demonstrated to have been accepted or incorporated into practice of state officials. There must be some bridging of the de jure/de facto gap, leading to some hybrid policy and practice. Judicial finding of such hybrids is unusual. In contrast to other categories of state action, then, 42 U.S.C. §1983 cases are rare.

The Operation of State Action: Other Considerations

The four categories of state action cases reflect the historical development of the concept and serve to indicate its evolution through judicial definition and redefinition. The trend of the current "Burger Court" has been to limit the last three categories by finding state action as a

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[69] 398 U.S. 144 (1970).

matter of course only in the first category of direct state action.[70] The Burger Court, for example, did not find state action in the Jackson v. Metropolitan Edison state affirmative privity case and the Moose Lodge Number 107 v. Irvis state regulation case. It also narrowed the scope of public function cases in Lloyd v. Tanner and Hudgens v. NLRB. It also limited jurisdiction and remedies under 42 U.S.C. §1983. This posture toward redefinition of state action has consequences for would-be plaintiffs in due process cases arising out of nonpublic educational institutions, of course; particular due process cases will be examined in Chapter V.

One commentator, pointing out that the competing interests are similar in Burger Court cases to those in earlier cases, noted that the balance struck by the Court is different. This means a "curtailment, rather than further expansion, of the state action concept," due in part to a "renewed judicial concern for private decision making."[71] Another commentator notes, however, that:

> It is crucial to understand that while the Burger Court may have evidenced a hesitancy to utilize the fourteenth amendment in peculiar fact situation, the conceptual analysis of the state

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[70] Note, State Action and the Burger Court, 60 Va. L. Rev. 840 n.3 (1974).

[71] Id. at 854.

> action inquiry proposed by the Warren Court still receives adherence. In each of these cases, the majority has employed the previously articulated standard that the state involvement must go directly to the alleged unconstitutional private activity and not simply attach to the private activity involved.[72]

To the extent that the Burger Court has "diluted" the Warren Court approach, it has done so by more consistently requiring the involvement link between the state and the specific challenged private activity to be "significant."[73] Combined with the Burger Court's restrictive tendency to limit holdings to the fact situation at hand,[74] the significance requirement affects Court treatment of the threshold state action issue in equal protection and due process cases. As it turns out, however, the "level of significance" required may be greater for due process than for some equal protection cases. The Warren Court's requirement of directness and specificity exhibited the same tendencies.

The Slaughter-House Cases mentioned earlier as limiting the privileges or immunities clause provided also the limiting notion that the fourteenth amendment applies only to racial discrimination. This view has had lingering

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[72] Note, supra note 4, at 613 n.7 (emphasis added).

[73] Id.

[74] Id. at 614 n.7.

vitality through different judicial standards for significance and specificity in equal protection race cases as opposed to nonrace equal protection and due process cases.

Though "most of the shifts in state action theory first made their appearance in the race cases,"[75] the issue of state action arises today most commonly in cases not involving race.[76] Courts in the latter have been "significantly less willing" to find state action than traditionally in racial discrimination cases.[77] Thus,

> Particularly in aid cases, some courts have asserted that a lower degree of state support would be required to constitute "state action" in equal protection suits against private persons for racial discrimination. They have relied in part upon the fact that the fourteenth amendment's foremost purpose was the eradication of certain types of racial discrimination, as is well-documented by scholarly investigation and judicial opinion. But it is likely that a judicial and social repugnance for all forms of racial discrimination has influenced the greater proclivity of the courts to find "state action" in this area.[78]

It should be pointed out that racial considerations seem to make little difference in agency and power-grant

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[75] Van Alstyne & Karst, State Action, 14 Stan. L. Rev. 3, 4 (1961).

[76] Note, supra note 20, at 658.

[77] Id.

[78] Id. at 661 (footnotes omitted).

cases,[79] of the affirmative privity subcategory of state involvement. This follows from questions of degree being "essentially nonexistent" in such cases. Most agency cases and a large proportion of power-grant cases, moreover, have not been equal protection cases in the first place.[80]

As a general rule in cases of the second category, then, if the challenged activity involves racial discrimination, an interest the defendant seeks to protect, "the scales are tipped to allow a finding of state action despite relatively slight state involvement."[81] In this balancing of interests, the courts consider the character of the plaintiff's alleged right and the context and circumstances of the alleged denial.[82]

This variable significance requirement was expressed in Shelley v. Kraemer, and more recently in the important Burton case. The Court in Burton stated that injunctive relief against the ostensibly nonpublic activity itself requires the state to be involved "to some significant extent" in the activity. There may be a less significant connection required in cases seeking the severance remedy,

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[79] Id. at 661.

[80] Id.

[81] Antoun, supra note 9, at 728 (footnote omitted). But see Evans v. Abney, 396 U.S. 435 (1970).

[82] Id. at 729.

however, because it involves a different balancing of interests.[83] Thus, although in state regulation cases the regulation must be "substantial," in the state aid cases, which involve government in a different posture, the courts have "explicitly and consistently" distinguished the quantum of aid required to trigger the two different remedies.[84]

The variable specificity or directness requirement, focusing upon whether the state is merely involved with the private actor in some general way, or directly with the specific challenged activity, is more stringent in nonracial cases. Less direct connection with the specific challenged private activity will give rise to state action in equal protection race cases than in equal protection nonrace cases or due process cases.[85]

In state aid cases involving racial discrimination, aid which only generally furthers the private or nonpublic activity is normally sufficient for the finding of state action and the ordering of the severance remedy, provided that the lower quantum of aid is met. In state aid cases not involving race, the aid typically must be shown to further the particular challenged activity,[86] and meet the higher quantum level.

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[83] Note, supra note 20, at 660.

[84] Id. at 700.

[85] Antoun, supra note 9, at 729.

[86] Id.

In the ultimate state involvement cases, wherein the state is viewed as a partner or joint venturer with the private actor, particularity is no problem; the state is deemed involved in all activities of the private actor.[87] Such a symbiotic relationship leads to general injunctive relief against the challenged activity.

The somewhat different approaches of the Warren and Burger Courts to state action serve to point out that it is "imperative that the scope of the state action doctrine be understood as continually evolving."[88] To the extent that it evolves, judicial redefinition is occurring. Indeed, judicial redefinition is the vehicle for that evolution. That evolution and redefinition in regard to due process issues generally and those arising out of nonpublic educational institutions specifically provide the focus of Chapters IV and V, dealing respectively with conceptual and contextual perspective on due process.

Summary

Contextual perspective on state action begins with recognition that state action is a judicially created concept that must be applied in concrete cases. In operation,

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[87] Id. at 729 n.59.

[88] Note, supra note 4, at 614 n.10.

state action cases may be divided into four basic categories: direct state action, state involvement, public function, and custom. Subsumed under the state involvement category are three subcategories: state affirmative privity, state regulation, and state aid. Examination of cases within these categories and subcategories reveals that evolution of the state action concept generally, in both equal protection and due process cases, has taken place and may presently be taking place through judicial redefinition. Two indicators of this are the limiting of holdings to the facts at hand and the involvement category requirements of significance and specificity. These latter are variable, being less of a barrier to the finding of state action in equal protection racial discrimination cases than in equal protection nonrace cases or due process cases.

CHAPTER IV

DUE PROCESS: CONCEPTUAL PERSPECTIVE

Introduction

Like state action, due process may best be understood by focus upon the twin perspectives of concept and context. This chapter will reflect the former and Chapter V the latter focus.

The Meaning of "Due Process of Law": Background

The notion of "due process of law" is not new. It is not, moreover, of American origin, though the phrase itself twice appears in the United States Constitution. Its English origins and its American development do demonstrate, in a way as meaningful for educational administrators as for high government officials, that the notion of fundamental fairness in dealings between a government and its people is critical to the existence of an ordered democratic society. The major conceptual issue in due process cases thus focuses upon the institutionalization of fundamental fairness as a matter of law.

First appearing in an English statute of 1354, the phrase "due process of law" had little of its current talismanic quality, even though the statute derived from the Magna Carta.[1] Indeed, it was to that great document's phrase "the law of the land" that Englishmen looked for protection from the state.[2] The two phrases became to a degree interchangeable by the end of the fourteenth century,[3] but "due process of law" has never been to Englishmen what it has become to Americans.[4]

The Articles of Confederation under which this fledgling nation was formed were conceived within a framework of strictly limited powers of the central government.[5] Such a framework reflected fear of the types of arbitrary government action that "the law of the land" and "due process of law" protected against in the mother country. What the framework brought about, however, was a central government too weak to govern.

The Constitution was drafted within a framework of limited powers, as well. This time, however, a practicable

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[1] Jurow, Untimely Thoughts: A Reconsideration of the Origin of Due Process of Law, 19 Am. J. Legal Hist. 265, 266 (1975).

[2] Id. at 279.

[3] H. Black, A Constitutional Faith 33 (1968).

[4] Jurow, supra note 1, at 279.

[5] A. Morris, The Constitution and American Education 23 (1974).

balance among powers and protections of the central government, the states, and the people was struck. It was the purpose of the soon-added Bill of Rights to make explicit the point of this balance. The tenth amendment, for example, provided:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

One important consequence of this statement of federalism is that individual states have plenary power over education, public and nonpublic, within their borders.

As critical as the relationship between the central government and the states was, it was the relationship between the central government and the people that formed the cornerstone of the Bill of Rights.[6] Among these protectors of individual rights was one of the fifth amendment's key clauses: "No person shall . . . be deprived of life, liberty, or property, without due process of law." The new Constitution thus incorporated both hallowed phrases of English governmental limitation; Article VI had spoken of the Constitution as the "Supreme Law of the Land." Though the American evocation of the law of the land seems more an affirmation of central authority than a limitation, the

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[6] Id. at 33.

fifth amendment picked up any slack through its due process express limitation "not on what the government could do, but on the process it had to follow in order to do it."[7]

The protections afforded Englishmen under the phrase "the law of the land," then, had become institutionalized in America specifically as "due process of law." This is particularly interesting in light of the fact that at the time the Bill of Rights was adopted the eight state constitutions affording similar protections used the phrase "the law of the land."[8]

The protections directly afforded by the Bill of Rights generally and its due process clause specifically extended to citizens in relation to the central government only.[9] What about the relationship between a person and his particular state? That is to ask, if this statement be so, and if education be a function of the states, how may due process issues arise in public or nonpublic educational institutions? The answer lies in another amendment to the Constitution, the fourteenth, adopted in 1868.

The fourteenth amendment provides that "No State shall . . . deprive any person of life, liberty, or property, without due process of law." The operative words are "State,"

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[7] R.E. Cushman & R.F. Cushman, Cases in Constitutional Law 530 (3rd ed. 1968).

[8] Id.

[9] Barron v. Baltimore, 7 Pet. 243 (1833).

which gives rise to the state action concept itself; "deprive," which gives rise to questions that go to the heart of the notion of freedom in an ordered society; "person," which gives rise to issues such as whether aliens or corporations are persons; "life, liberty, or property," which give rise to the critical issue of what interests a state must not arbitrarily or summarily deprive a person; and "due process of law," which give rise, as will be shown, to more than simply the basic procedural question, "What process is due?"

The state action concept has provided the focus of the preceding chapters. The meaning of "deprive" is not obvious.[10] The exercise of a state's police powers places limits upon the extent to which one's behavior or use of property may interfere with the liberty or property rights of others. People give up their claim to complete personal freedom as the price of membership in an ordered society. The due process clause exists in order to keep the price paid minimal. Not coincidentally, it is this aspect of that basic balance of powers and protections discussed earlier that spawned development of substantive due process, discussed later.

The operative word "person" has settled legal effect; within the context of education, for example, aliens must be

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[10] J.N. Story & L. Ward, Perspectives of American Law 73 (1974).

afforded the same due process protection as citizens,[11] and corporations such as nonpublic schools cannot be deprived of property without due process of law.[12] The word "person" should not be confused with "citizen."

Discussion of what is meant by "life, liberty, or property" is critical to an understanding of due process as a concept, and will follow directly. That discussion will lead logically into inquiry into the dual nature of due process, i.e., its procedural and its substantive forms. Included in the latter is the whole question of the relationship between the fourteenth amendment's due process clause and the Bill of Rights.

The Meaning of "Due Process of Law": Analysis

Constitutionally Cognizable Interests

The fourteenth amendment requires that a state must provide a person due process of law if it deprives him of "life, liberty, or property." "Life," it would seem, is the constitutionally cognizable interest least open to definitional ambiguity. The question of what "liberty" and "property" mean remains. Courts have found it a difficult

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[11] Truax v. Raich, 239 U.S. 33 (1915).

[12] Pierce v. Society of Sisters, 268 U.S. 510 (1925).

one. "It is not clear whether certain conduct or interests are liberty or property, nor is it clear whose interest is protected" in certain cases.[13] Conceptual perspective, furthermore, is complicated by the contextual nature of the terms. "'Liberty' and 'property' are broad and majestic terms. They are purposely left to gather meaning from experience."[14]

Liberty, as a constitutionally cognizable interest protected by the due process clause, means more than simply freedom from bodily restraint.[15] Early judicial definitions of this interest are not particularly illuminating, however. These range from liberty being seen as the right "generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men,"[16] to tautologies such as "liberty under law extends to the full range of conduct which the individual is free to pursue."[17] More recent cases permit more meaningful analysis of the term.

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[13] Rendleman, The New Due Process: Rights and Remedies, 63 Ky. L. J. 531, 544 (1975).

[14] Board of Regents v. Roth, 408 U.S. 564, 571 (1972).

[15] Rendleman, supra note 13, at 543.

[16] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[17] Bolling v. Sharpe, 347 U.S. 479, 499 (1954).

Liberty relates to conduct and status.[18] It is a growing concept both because liberty interests are the "leftovers"--those interests not protected under the Bill of Rights or fourteenth amendment life and property--and because novel often intangible interests are being claimed in recent and current due process cases.[19]

Three classes of liberty interests may be discerned. These differ in the point of balance struck between significance accorded the personal stake and justification accorded the governmental exercise of authority.[20] This balancing is particularly contextual in that liberty "varies with the setting,"[21] but conceptual classifying is helpful.

The first class of liberty interests comprises situations wherein the personal stake is so significant that the government simply cannot interfere. The affording of procedural due process is not an issue in such situations because the state cannot constitutionally deprive a person of such liberty.

The second class comprises economic, expressive, and locomotive conduct. It includes interests such as "freedom from government action which attaches a stigma, restrains

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[18] Rendleman, supra note 13, at 544.

[19] Id.

[20] Id. at 545-46.

[21] Id. at 544.

personal freedom or works a hardship."[22] The balance in this class shifts so that the state may regulate the liberty after according procedural due process.

The third class of liberty interests comprises those situations wherein a person claims an interest found by a court to be of such little significance that no constitutionally cognizable liberty interest is involved. The state need not afford procedural due process when depriving a person of the claimed interest.

Some liberty interests of concern to educational administrators depend upon the legal relationship between the teacher, employee, or student, and the institution. That relationship also serves as a key to determination of the other constitutionally cognizable interest, property.

Like liberty, property is not an easy concept to define. For purposes of due process analysis it comprises more than traditional notions of objects legally protected through title or ownership.[23] "Income, status, job security are the new property of the corporate society."[24] This "new property" is conceptually important in due process analysis today because of judicial recognition that the

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[22] Id. at 545. See also Bishop v. Wood, 426 U.S. 341 (1976).

[23] O. Browder, R. Cunningham, & J. Julin, Basic Property Law 6 (1966).

[24] J.N. Story & L. Ward, supra note 10, at 59.

ancient institution of property and the century-old reference to it in the fourteenth amendment must change to deal with the changes wrought by the passage of time in an ever-modernizing society.[25] Educational administrators should be aware that when such interests as tenure status for teachers and student status for their clients are considered "governmental largess," process may be due prior to deprivation of such "new property."[26]

Whether new or old, property is "nothing more than that which the courts choose to call and protect as property."[27] The educational policy-making aspect of judicial decision making often becomes manifest in just such a situation. The Supreme Court, fortunately, has established some guidelines for this choice:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.[28]

As mentioned above, one important consideration is the legal relationship between the individual and the

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[25] Id. at 58.

[26] See Reich, The New Property, 73 Yale L. J. 733 (1964).

[27] J.N. Story & L. Ward, supra note 10, at 59.

[28] Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

governmental entity. The legal relationship between teachers or students and their public educational institution bears upon the finding of constitutionally cognizable interests. If the institution is ostensibly nonpublic, yet is found to engage in state action, the legal relationship between teachers or students and the institution similarly influences conceptual analysis.

The notion of tenure in public office as a type of property interest is not new. "In England until the 16th century, offices were protected like cattle or real estate."[29] Practice in the American colonies reflected this attitude, but the framers of the Constitution attempted, on the national level, at least, to replace this with procedures of appointment to federal office.[30] Even so, in order to attract and retain highly qualified office holders, de facto tenure was allowed to develop; federal office began to seem more and more a form of property.[31]

By contrast to the general perception, the courts were not disposed to view public employment as a property interest. Courts looked upon the employee-government employer relationship as a privilege, not a right of the

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[29]Note, The Due Process Rights of Public Employees, 50 N.Y.U. L. Rev. 310, 311 (1975).

[30]Id. at 312.

[31]Id. at 313.

employee.[32] As a matter of law, the legal relationship of employment was traditionally "very remote from traditional notions of property."[33] Nevertheless, with the coming of the modern social service state came the notion of "new property." The right-privilege distinction was abandoned, replaced by express focus upon the circumstances under which the public employment relationship may give rise to a property or liberty interest.[34]

A property interest in employment arises from a specific statutory or contractual entitlement, from an implied contract, or from the "common law" of a particular industry, plant, or campus.[35] A tenured teacher, for example, has a legal relationship with his public employer that is a property interest. He cannot be dismissed without procedural due process.

Treatment of student status parallels that accorded employee or teacher status. The right-privilege distinction long governed judicial treatment of the student-institution relationship in public and to an even greater extent in

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[32] See Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968).

[33] Developments in the Law--Academic Freedom, 81 Harv. L. Rev. 1045, 1081 (1968).

[34] Board of Regents v. Roth, 408 U.S. 564 (1972).

[35] Note, supra note 29, at 323.

private educational institutions. Elementary and secondary students had something of a statutory right to attend public school, but nonpublic school and university students attended on the basis of privilege.[36] Though the former right was by no means absolute, the latter privilege was far the more tenuous tie.

Privilege is by no means the only conceptually sound characterization of the student-institution relationship. Indeed, privilege is frequently viewed in conjunction with the tort notion of *in loco parentis*. Other sometimes overlapping or mutually reinforcing conceptual bases for the student-institution relationship, particularly in post-secondary schools, are contractual, trust, fiduciary, and constitutional.[37] Which relationship or combination is adopted as a matter of law by a court has important consequences for educational administrators. Thus, the privilege-contract-*in loco parentis* combination long favored by the law encouraged practices significantly different from those effected by the constitutional relationship currently held applicable to public educational institutions.

Prior to the mid-1950's, most challenges to public school practices and policies were brought in state courts.

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[36] Note, Legal Relationship Between the Student and the Private College or University, 7 San Diego L. Rev. 244, 249 (1970).

[37] K. Alexander & E. Solomon, College and University Law 410-14 (1972).

The presumption standardly employed was that unless a plaintiff could prove them in the context of in loco parentis to be arbitrary, capricious, or unreasonable, such practices and policies were valid. As older conceptual analyses fell into judicial disfavor, focus upon notions of property and liberty and resort to federal courts increased. Federal willingness to hear cases arising out of the educational setting was thus not coincidentally accompanied by federal court adoption of the constitutional relationship. Extension of fourteenth amendment protections to students in relation to public school practices and policies has "substantially eroded the formerly prevalent doctrine of in loco parentis and has expanded the policy-making concerns of school officials."[38]

The conceptual murkiness accompanying judicial development of the constitutionally cognizable interests of liberty and property has not been resolved. It is not surprising, then, that in some cases it is not clear whether certain conduct or interests are property or liberty. It is clear that, except in extraordinary situations or emergencies,[39] once a constitutionally cognizable interest is to be deprived a person, the requirement for procedural due process attaches.

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[38]Nystrand & Staub, The Courts as Educational Policy Makers, 77 NSSE Yearbook 31 (1978).

[39]Rendleman, supra note 13, at 589.

Operational Duality

The preceding section included mention of procedural due process being triggered by a deprivation of a constitutionally cognizable interest. As it happens, not all due process is procedural; due process has two conceptual forms, procedural and substantive. In operation, each form serves to provide fundamental fairness in relations between an individual and his state, to "control private abuse of public power and to reconcile individual freedom with the social service state."[40]

The original meaning of the phrase "due process of law" was that the state is constrained from limiting the life, liberty, or property of any person unless it does so through proper procedures. Trial by jury in criminal cases was the assumed manifestation.[41] The idea, expanded to include administrative deprivations, but still focusing upon adjudicative, not legislative acts,[42] is basic to Anglo-American civilization. "The history of liberty," wrote Supreme Court Justice Felix Frankfurter, "has largely been the history of procedural safeguards."[43] To the individual

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[40] Id. at 559. See also Sniadach v. Family Finance Corp., 395 U.S. 337, 342 (1969) (Harlan, J., concurring); Fuentes v. Shevin, 407 U.S. 67 (1972).

[41] K. Alexander, R. Corns, & W. McCann, Public School Law 177 (Supp. 1975).

[42] Rendleman, supra note 13, at 559.

[43] McNabb v. United States, 318 U.S. 332, 347 (1943).

being deprived of his life, liberty, or property, procedural due process can work, for example, to ensure both that he in fact committed an offense for which he is being punished and that the punishment itself is imposed fairly and responsibly.[44] As a cultural bulwark supporting the rule of law, procedural due process is a conservative doctrine because it requires "cautious, deliberate decision making" and thus impedes rapid change.[45]

What is the nature of the process itself when due? Again, Justice Frankfurter:

> Due process unlike some legal rules is not a technical conception with a fixed content, unrelated to time, place and circumstances. . . . It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted the unfolding of its process.[46]

Once state action and a constitutionally cognizable interest are found, the procedural due process which follows, except in extraordinary situations or emergencies, includes notice and a hearing. Conceptual subelements can make these more complicated than they may on their face appear. Consider, for example, the requirements in a college

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[44]Wright, The Constitution on the Campus, 22 Vand. L. Rev. 1027, 1084 (1969).

[45]Rendleman, supra note 13, at 539.

[46]Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring).

disciplinary action. The notice requirement compels the agency or institution to make a good faith effort to notify the student, through written notice, of specific charges, time and place of the hearing, evidence to be presented against him, and possible action to be taken if the charges are upheld.[47] The hearing requirement compels fundamental fairness in the forum of decision. Conclusions must be based upon substantial evidence adduced at the hearing.[48] The hearing officers, moreover, must be impartial,[49] and the actions taken must be reasonable related to the gravity of the offense.[50]

The form of the hearing differs from case to case. This variation is not only constitutionally permissible, but necessarily follows from the conceptual analysis employed by the courts.[51] Just as the nature of the interest at stake is the key to triggering the process, the weighing of the respective individual and state interests determines the form of the key part of that process, the hearing.[52]

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[47] D.P. Young, The Yearbook of Higher Education Law 1977 100 (1977).

[48] Wright, supra note 44, at 1063.

[49] Johnson, Due Process Requirements in the Suspension or Dismissal of Students from Public Educational Institutions, 5 Capital U. L. Rev. 1, 29 (1976).

[50] Wright, supra note 44, at 1084.

[51] See Rendleman, supra note 13, at 536.

[52] Board of Regents v. Roth, 408 U.S. 564, 570 (1972).

The greater an individual's chance of suffering a deprivation amounting to "grievous loss,"[53] the more formal the hearing. Conversely, greater weight is accorded the government's interest in less costly, expeditious administration when an individual's stake is not so great. Procedural safeguards that vary with the interests at stake include the right to call witnesses in one's behalf, the right to confront and cross-examine adverse witnesses, and the right to be represented by legal counsel. Though the key to the procedural form is the context of the particular case, the basic objective of procedural due process is, as always, fundamental fairness.

Absence of requisite formalities need not be fatal to an institution's case. There is a "well-established theory in the lower courts" that any procedural defects in a due process hearing can be cured by a new hearing before another hearing body, provided that "there are no substantial defects in the proceedings of the second body."[54] Absence of due process itself is another matter.

If the governmental administrative agency, such as public educational institution, fails to achieve fundamental fairness by neglecting or refusing to afford procedural due process, what course should the aggrieved

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[53]Goldberg v. Kelly, 397 U.S. 254, 263 (1970).

[54]Johnson, supra note 49, at 29-30.

teacher, employee, or student take? Collective bargaining contracts may provide some recourse for teachers or other employees through the negotiated grievance machinery, but students do not enjoy such contractual protection, a perceived contractual student-institution relationship notwithstanding. For them and for many teachers and other employees, recourse is often found in the courts. The question then becomes one of procedure and remedy.

Section 1983, the federal Civil Rights Act of 1871, is "the major vehicle for due process suits."[55] Coupled with 28 U.S.C. §1343(3), this statute provides federal jurisdiction in such actions, as was discussed earlier in connection with state action. Not only are all these cases and thus most due process cases brought in federal courts; most are also class action suits.[56] Individuals must decide how best to pursue their remedy.

State courts also are competent forums for bringing federal due process claims.[57] Such competence is called jurisdiction over the subject matter. It should be noted that together with jurisdiction over the person sued, competence is a due process safeguard in the judicial process

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[55] Rendleman, supra note 13, at 535.

[56] Id. at 671.

[57] Id.

itself.[58] Using a state court avoids the federal jurisdictional problems discussed earlier, facilitating direct focus upon the constitutional issue. In addition, both state courts as expositors of common law and federal courts under pendent jurisdiction can hear, decide, and base remedies upon alternative arguments grounded in nonconstitutional tort theory.[59] It is, after all, remedy that the plaintiff seeks.

Remedies afforded by courts for procedural due process violations include both equitable remedies such as injunctions, orders for reinstatement of personnel or expungement of records, and also legal remedies consisting of money damages. Types of legal remedies include nominal damages, actual damages, compensation for impalpable loss, and punitive or exemplary damages.[60] As should be apparent, the remedy afforded is tailored to the injury received. This underscores the contextual nature of due process cases, addressed in Chapter V.

What about substantive due process? The term originally referred to constitutional restraints judicially placed upon state regulation of private property.[61] The idea predated

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[58] Id. at 594.

[59] Id. at 671-72.

[60] Id. at 664-65.

[61] Cord, Neo-Incorporation: The Burger Court and the Due Process Clause of the Fourteenth Amendment, 44 Fordham L. Rev. 215, 233 n. 109 (1975).

the fourteenth amendment. Indeed, one of the central purposes of the Constitution was the "protection of private property from the irresponsible attacks of the 'too popular' state governments."[62] This idea formed the basis of the Dartmouth College case, discussed later, though the obligation of contracts clause upon which that case was based gradually lost its protective vitality. Fifth amendment substantive due process was intimated a decade before ratification of the fourteenth amendment in the Dred Scott decision,[63] but the Supreme Court resisted the notion that the substance of a state law could be held void for want of due process until close to the turn of the century.[64]

When a majority of the Court finally accepted the notion of this "economic-substantive due process," it focused upon the reasonableness of the state regulatory statute. It was this focus, filtered through the economic theory bias of judges, that led to the striking down of many state laws regulating property and liberty interests. Such interests included the imposing of railroad rates, the operating of private schools, and the teaching of modern languages. This focus via the fifth amendment later doomed early New Deal legislation.

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[62] R.E. Cushman & R.F. Cushman, supra note 7, at 530.

[63] 19 How. 393 (1857).

[64] R.E. Cushman & R.F. Cushman, supra note 7, at 530.

In assessing the "reasonableness" of a statute to determine whether it infringed upon some notion of property or liberty protected by the due process clauses, courts looked to several criteria: whether the statute evinced a proper purpose; whether the means employed were substantially related to that purpose, if proper; and whether the statute intruded upon property or liberty interests more than was necessary to achieve a proper purpose.[65] Conceptually, this analysis seems legitimate, even compelling. Contextually, it ran headlong into an economic depression so great that the free enterprise values so basic to economic due process and so instrumental in causing the devastation could not bring the nation out of it. When the tide shifted and New Deal legislation began to be sustained, economic-substantive due process under both the fifth and fourteenth amendments fell rapidly into judicial disfavor.[66]

"More recently, the 'liberty' of Adam Smith has been supplanted by that of John Stuart Mill."[67] The protection of political and civil liberties lies at the heart of this "new" substantive due process. The standard applied is similar to that in equal protection cases involving the

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[65] Note, The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification, and Some Criteria, 27 Vand. L. Rev. 971, 974 (1974).

[66] Id. at 977-78.

[67] Cord, supra note 61, at 233 n.109.

compelling state interest test,[68] and not unlike that used in old economic due process cases.

Application of this standard through substantive due process in the education setting protects against regulations that are unduly vague or overbroad,[69] rules improperly promulgated or enforced, and rules unrelated to legitimate public school or university business.[70] It should be noted that reasonable restriction upon personal liberty by exercise of a state's police powers is legitimate,[71] but these types of restrictions, and others such as some statutory irrebuttable presumptions, are not.

As mentioned earlier, the Bill of Rights, with the array of political and civil liberties it embraces, applies directly only to the federal government. To be sure, many state constitutions provide bills of rights, but how are one's political and civil liberties in relation to the state protected as a matter of federal law? The due process clause of the fourteenth amendment and the notion of substantive due process provide the key.

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[68] Note, supra note 65, at 981.

[69] D.P. Young, The Law and the Student in Higher Education 10 (NOLPE Monograph Series, 1976).

[70] Note, Private Government on the Campus--Judicial Review of University Expulsions, 72 Yale L. J. 1362, 1403-09 (1963).

[71] J.N. Story & L. Ward, supra note 10, at 74.

Relationship with the Bill of Rights

Justices of the Supreme Court have embraced several views about the relationship between the Bill of Rights and the fourteenth amendment. The connection, when found, couples the first ten amendments with the liberty provision of the fourteenth amendment's due process clause.[72] That coupling lends substantive content to the clause. It is the perceived nature of the coupling that gives rise to competing views on this important relationship.

The "ordered liberty approach"[73] or "fundamental rights view" once prevailed in the Supreme Court.[74] This view denies direct connection between the Bill of Rights and the fourteenth amendment. Under it the due process clause is seen as having a substantive content of its own, based upon the traditional civil and political freedoms of our Anglo-American civilization. These freedoms are not necessarily embodied in the Bill of Rights.[75] Adherents to the ordered liberty or fundamental rights view championed the dynamic concept of due process it posited;[76] critics saw this as "ad hoc subjectivity"[77] on the part of judges.

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[72] A. Morris, supra note 5, at 83.

[73] Cord, supra note 61, at 216.

[74] A. Morris, supra note 5, at 83.

[75] Id. at 84.

[76] Cord, supra note 61, at 219.

[77] A. Morris, supra note 5, at 84.

The "total"[78] or "complete incorporation view" finds the connection between the Bill of Rights and the due process clause of the fourteenth amendment a one-to-one correspondence. This unfavored view holds that the Bill of Rights "in its entirety, but nothing more," is incorporated into the fourteenth amendment.[79] Adherents to the total or complete incorporation view base their preference upon the belief, disputed by critics of the view, that the intent of the framers of the fourteenth amendment was to apply the Bill of Rights to the states.[80]

The "selective incorporation view" combines certain elements of the preceding views; the idea is that the liberty provision of the due process clause "necessarily, but selectively" incorporates verbatim only those guarantees of the Bill of Rights that are essential to the scheme of ordered liberty.[81] Adherents must decide both which guarantees should be selected and upon what criteria that selection will be based, but view this as flexibility.[82] Critics call the view a "spurious compromise" between the

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[78] Cord, supra note 61, at 224.

[79] A. Morris, supra note 5, at 85.

[80] Id.

[81] Id. at 86.

[82] Id.

two views it combines, with none of the historical or logical support of either.[83]

The "ultra-incorporation"[84] or "complete incorporation plus fundamental rights view" holds that the fourteenth amendment liberty incorporates the Bill of Rights in its entirety and embraces certain additional "fundamental rights" as well.[85] The view thus attempts to combine closed-ended and open-ended approaches to the substantive meaning of due process;[86] arguments for and against the particular combination echo those expressed above for each component.

The "selective incorporation plus fundamental rights view" is the current overall view of the Supreme Court on the relationship between the Bill of Rights and the fourteenth amendment.[87] This view combines flexible selective incorporation with certain additional "fundamental rights" not expressly set forth in the Constitution. Again, arguments for and against this combination in turn combine those above. "Most recently, substantive due process has been associated with the emerging right of privacy."[88] Emergence

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[83] Id. at 87.

[84] Cord, supra note 61, at 226.

[85] A. Morris, supra note 5, at 87.

[86] Cord, supra note 61, at 227.

[87] A. Morris, supra note 5, at 87.

[88] Cord, supra note 61, at 234 n.109.

of that right has been facilitated by the operation of this view.

A variation on the several views that involve incorporation has been termed "neo-incorporation," reflecting its recent origin.[89] Embracing the terminology but not the substance of the traditional incorporation approaches discussed above, neo-incorporation incorporates the basic procedural rights from the Bill of Rights into the fourteenth amendment, but does not thereby limit state power exactly as the original rights limit federal power.[90] It is a question of degree, most notably in questions of criminal procedure.

However manifested, substantive due process, like its procedural counterpart, is an important concept in law today. Before becoming operative as a constitutional requirement in a given situation, however, each form presupposes state action. Public elementary/secondary and postsecondary school administrators should therefore gain an understanding of due process as a legal concept, and translate that understanding into appropriate and resolute action.

But what about nonpublic school administrators? Must they, too, understand due process and put it into operation?

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[89] Id. at 232.

[90] Id. at 234, 237.

That, the key question of the study, can only be addressed through focus upon particular court cases. With conceptual perspective achieved, this contextual perspective forms the basis of Chapter V.

Summary

Conceptual perspective of due process begins with focus upon historical development of the concept. Consideration of constitutionally cognizable interests and the two operational forms of due process, substantive and procedural, underlie analysis of the concept. Fourteenth amendment due process is related to the Bill of Rights, though the specific connection is a source of judicial and scholarly debate.

CHAPTER V

DUE PROCESS: CONTEXTUAL PERSPECTIVE

Introduction

Just as personification can be a problem in writing, reification can be a problem in law. The talismanic quality of the concept of due process of law was noted earlier; the associated problem here is to provide contextual meat to the conceptual skeleton provided in Chapter IV, without implying that due process, any more than a corporation, is something more than a concept, something "real." The legal effect, to be sure, is real enough, and it is this that forms the basis of this chapter.

The Operation of "Due Process of Law": Background

Educational administration is not simple. One complication is that it, like the society it serves, is becoming more legalistic. In today's public and nonpublic educational institutions, legal considerations impinge upon more and more decisions, in more and more ways.

As a matter of effective administration, fundamental fairness should be indispensable to professional

administrative behavior. It is a matter of ethics no less than effectiveness, and should be no less indispensable in nonpublic than in public educational institutions. As a matter of law, however, fundamental fairness as embodied in due process would seem constitutionally required in the former but not the latter institutions.

The major contextual issue in due process cases arising from ostensibly nonpublic educational institutions is whether the court can discern sufficient connection between the institution's activity in each case and a state to support a finding of state action as a matter of fact, triggering requirement of due process as matter of law. The educational practice and policy issue is the extent to which federal constitutional restrictions do or should circumscribe the practice and policy of administrators in nonpublic educational institutions. Examination of these issues involves discussion of the educational milieu as well as specific court cases dealing with procedural and substantive due process for the employees and clients of both public and nonpublic educational institutions.

The Operation of "Due Process of Law": The Milieu

All American public and nonpublic educational institutions exist within the cultural framework of this society, as well as within the local setting peculiar to each. These may be termed the broader milieu and the narrower milieu.

Pervading the broader milieu are the cultural norms and values that govern the basic societal institutions of law and education, among others. Today these norms and values are grounded in the principles of an open society, viz., equality and fair treatment.[1] Another term for fair treatment is due process. As noted earlier, the notions of the law of the land, due process, and the dignity of the individual, have long been a hallowed part of the Anglo-American life; an open society is not an illogical goal in such a cultural milieu. Similarly, the inference is not unwarranted that in a truly open society, courts should hear and decide due process and other legal issues arising out of nonpublic as well as public educational institutions.

Education, as a basic societal institution, moreover, should in theory be as prone to litigation as other basic societal institutions. Logically, courts should respond with similar alacrity to the adjudicatory needs, for example, of education and business. The logic of equality among societal institutions and the logic of judicial policy making are not necessarily the same, however.

Courts have long been involved with education,[2] but the educational enterprise has also long been considered unique

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[1] Freund, The Challenge of the Law, 40 Tul. L. Rev. 475, 480 (1966).

[2] See J.C. Hogan, The Schools, the Courts, and the Public Interest 7 (1974).

in this country. Courts consequently have traditionally practiced a studied restraint in dealing with potentially legal issues arising from that setting, deferring to the judgment and expertise of educational leaders, and placing a high value upon institutional autonomy.[3] This has particularly been the case in postsecondary education litigation. Some values and interests vary in relevance or importance depending upon the level of education involved; judicial policy making reflects this variability.

Whether the tradition of judicial restraint, already eroded in increasingly legalistic America, continues is an important question. Implicit are, of course, policy considerations reflecting both historical and contemporary value choices and interest balances. Courts take note of the special nature of the educational community, especially the university community, the proper role and function of the educational enterprise, the importance of education to students, and the maturity and responsibility of those students, among other policy considerations. At the same time, the increasing involvement of state and federal governments with nonpublic education cannot be ignored.[4]

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[3]Note, Judicial Review of the University-Student Relationship: Expulsion and Governance, 26 Stan. L. Rev. 95 (1973).

[4]O'Neil, Private Universities and Public Law, 19 Buff. L. Rev. 155, 170-71 (1969).

Perhaps the basic policy consideration reflects the uniqueness of education. Education is divided into the complementary areas of elementary/secondary and post-secondary or higher education. Another division, critically important here though not entirely unique, is public and nonpublic education. The term "educational institution," it will be recalled, includes by definition each of these important divisions. An educational institution may be, for example, a public elementary school or a nonpublic university, a nonpublic high school or a public community college. Moreover, the term here denotes a nonproprietary institution. The question of nonproprietary status is dispositive of several important legal issues, such as tax exemption, tort immunity, and accreditation.

The case that early in this country's history set the legal precedent providing the philosophical as well as the strictly legal basis for nonpublic education in the United States was the landmark Dartmouth College case.[5] There Chief Justice John Marshall, writing for the Supreme Court, set the tone for a rigid public/private dichotomy among educational institutions, helping thereby to ensure the future role of the private or nonpublic sector of education at all levels.

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[5]The Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (1819).

Dartmouth College was chartered in 1769 by the English Crown, the charter creating a board of trustees empowered to choose a president and fill vacancies in board membership. Ten years later, the first president was succeeded by his son, who proved to be an inept educational administrator. Dissatisfaction with the new president grew among the trustees, culminating finally in their removal of him in 1815. Meanwhile, the conflict had entered the political arena, and in 1816 the political group which supported the former president gained control of New Hampshire. This group soon completely reorganized the college by statute, providing for additional trustees to be appointed by the state governor and for numerous other indices of state control. The newly constituted board reappointed the former president, conflict over control of the institution, now called Dartmouth University, accelerated, and suit was brought by the trustees who predated reorganization.[6]

Before reaching the United States Supreme Court, the case was heard by the Supreme Court of New Hampshire. In terms that have had renewed emphasis in the much more recent legal history of the state action concept, the court upheld the reorganization on the ground that the institution

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[6] R.E. Cushman & R.F. Cushman, Cases in Constitutional Law 493-94 (3rd ed. 1968).

had become public in character, and was thus subject to state control.[7]

Marshall rendered his opinion on the basis of a different, federal constitutional ground. The dispositive constitutional provision prohibits states from passing any law which has the effect of impairing the obligation of contracts.[8] The Court held that New Hampshire had done just that in regard to the original charter/contract. The Dartmouth College reorganization was therefore invalid.

The hidden agenda in the decision was encouragement of industrial development in the young United States. Those who would invest in corporate enterprises were assured that their corporations would be free from undue state interference.[9] As noted earlier, these are the same concerns that later led to judicial acceptance of economic-substantive due process notions.

As also noted earlier, the case as well provided the basis for private educational institutions in the United States. It was the seminal legal precedent underlying the existence and development of American private education at all levels.

The starting point in Marshall's analysis of education was his recognition of a strict public/private dichotomy;

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[7] Id. at 494.

[8] U.S. Const. art. I, §10.

[9] R.E. Cushman & R.F. Cushman, supra note 6, at 494.

"Marshall perceived a neat distinction between 'a civil institution to be employed in the administration of government' and 'a private eleemosynary institution.'"[10] Despite the fact that this strict dichotomy does not accurately reflect the realities of modern institutional life, the federal courts have traditionally tended to view private higher education in Marshall's terms.[11]

This view has had direct impact upon fourteenth amendment analysis since the strict dichotomy goes directly to the idea of state action, the threshold issue in that analysis. The persistence of this view, moreover, has seemingly been unaffected by the fact that Marshall's opinion predated enactment of the fourteenth amendment by half a century.

Complicating the judicial perspective is another enduring observation made by Marshall in the Dartmouth College case. The idea persists that nonpublic institutions such as colleges and universities do not, in Marshall's words, "fill the place, which would otherwise be occupied by government, but that which would otherwise remain vacant."[12] Higher education, according to Marshall, is thus essentially a private or nonpublic endeavor. This orientation, coupled

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[10] O'Neil, supra note 4, at 156.

[11] Id. at 157.

[12] 17 U.S. 518, 647 (1819).

with the uniqueness of education and the requirement of state action for application of fourteenth amendment restrictions, led to a tradition of judicial restraint in hearing cases arising out of higher education in general, and nonpublic higher education in particular. Elementary/secondary education must also be considered, since it too has been affected in important ways by the rationale, holding, and dictum of the Dartmouth College case.

Private or nonpublic schools have a right to exist. This is one implication of the Dartmouth College case, progressively clarified by subsequent cases. These, taken together, posited a somewhat different statement of the proposition. That is, operators of nonpublic schools have a right to operate their enterprises, parents, including public school teachers, have a right to send their children to nonpublic schools,[13] and students have a corollary right to attend nonpublic schools.[14]

These property and liberty interests are substantively protected by the due process clause of the fourteenth amendment. Nonpublic schools can be regulated by the state, provided that the regulation is reasonably related to a

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[13]Pierce v. Society of Sisters, 268 U.S. 510 (1925); Cook v. Hudson, 429 U.S. 165 (1976); See also Meyer v. Nebraska, 262 U.S. 390 (1923).

[14]See Wisconsin v. Yoder, 406 U.S. 205, 241 (1972) (Douglas, J., dissenting in part).

legitimate state interest, but nonpublic schools cannot be broadly prohibited from operating. This is the "Pierce Compromise," demonstrative of the judicial policy approach toward the basic tension between state and individual interests. Viewed from the perspective of the broader milieu, it is this tension that spawns most lawsuits arising out of education.[15]

Pervading the narrower milieu of individual educational institutions are the norms and values that operate in each. These may be viewed conceptually as roles and role expectations existing within the social system called an educational institution.

Within this social system are four subsystems. Based upon the seminal work of Talcott Parsons, these are the institutional, managerial, technical, and client subsystems.[16] The local school board or board of trustees constitutes the institutional subsystem, administrators the managerial, teachers or professors the technical, and pupils or students the client.

Each of these subsystems influences and is influenced by the others, but the norms and values that determine the role expectations involved are also determined by factors

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[15] D. Kirp & M. Yudof, Educational Policy and The Law 1 (1974).

[16] J.T. Thompson, Policymaking in American Public Education 41 (1976).

outside the institution itself. The broader cultural milieu of course has influence, but within the local setting extra-institutional influence comes from parents, alumni or community influentials, political or professional organizations, and other interests groups. This influence helps determine whether due process, like collective bargaining, fits comfortably within the narrower milieu of an individual educational institution. Just as the Pierce Compromise required due process for certain educational institutions, judicial decisions may require due process within institutions, regardless of fit.

The Pierce Compromise involved judicial value choices and interest balancing mentioned earlier in the context of judicial restraint. In that earlier context, values have been chosen and interests balanced in two phases, reflective in part of judicial redefinition of state action. First, some courts overcame traditional judicial restraint in cases involving alleged violations of equal protection and due process in public educational institutions. As direct state action was involved, the threshold state action issue was quickly resolved on its face in such cases. Second, the restraint barrier was lowered in some cases arising from nonpublic educational institutions.[17] In these cases the threshold state action issue, as well as the traditional

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[17] O'Neil, supra note 4, at 155.

reluctance of judges to scrutinize the actions of educational administrators, had to be overcome. In so doing, in elevating certain values and interests above others traditionally favored, judges set educational policy.

Both the broader and the narrower milieu influence and are influenced by such policy setting; law does not exist apart from the society it serves. Conceptual evolution of legal doctrine evokes real contextual change. To be sure, the two-phase development of court-found state action in education cases evinces the kind of evolution and redefinition that has characterized the concept. But the importance of such developments lies not so much in their appeal to the legal scholar as in their ramifications for the practicing educational administrator. This shall become apparent in discussion of specific due process issues, in the context of particular cases.

The Operation of "Due Process of Law": Cases

Procedural Due Process

The Pierce Compromise prompted one commentator to pose a question concerning its possibly reflexive character:

> It is evident from Pierce that private schools and colleges enjoy immunity under the fourteenth amendment from unreasonable interference with their liberty to serve students of all ages in accord with the desires of parents. The logical subsequent question is whether institutions which have been

> warranted against deprivations of their rights to life, liberty, and property must, under the fourteenth amendment, grant these rights to the students over whom they exercise certain control.[18]

Though Pierce was a substantive due process case, the question is well worth addressing. It is equally worth addressing in regard to institutional employees, most notably teachers. The question will be first addressed in this context; focus upon institutional clients will follow.

Institutional employees

Constituting the technical subsystem of any educational institution are the teachers or professors. Although educational institutions have other types of employees, ranging from managerial level administrators to nonteaching professionals to support personnel, it is the teachers who have generated most of the important procedural due process employment cases in education. Since the bulk of these has arisen from public educational institutions, the first section shall make that contextual focus. The second will focus upon ostensibly nonpublic educational institutions and thus necessarily upon state action.

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[18]Note, Legal Relationship Between the Student and the Private College or University, 7 San Diego L. Rev. 244, 248 (1970) (footnote omitted).

Public education institutions: state action not at issue. The companion higher education cases Board of Regents v. Roth[19] and Perry v. Sindermann[20] set the precedential tone in this area. Both plaintiffs alleged that their nonrenewals, unaccompanied by procedural due process, unconstitutionally deprived them of liberty and property interests. The liberty interests claimed centered upon freedom of expression. The property interests claimed centered upon expectancies of reemployment.

Neither case turned upon the liberty issue, but the Roth opinion did note that a public employee's liberty would be adversely affected and procedural due process required by two types of termination. These occur when, in the decision to deny reemployment, charges are issued that might seriously damage the employee's standing and associations in the community, and when the denial of reemployment imposes upon the employee a stigma or other disability that forecloses other employment opportunities.[21] These give rise to a subjective judicial test and an objective judicial test, respectively.[22] The Court reaffirmed its holding that

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[19]408 U.S. 564 (1972).

[20]408 U.S. 593 (1972).

[21]408 U.S. 564, 573 (1972).

[22]Note, The Due Process Rights of Public Employees, 50 N.Y.U. L. Rev. 310, 330 (1976).

public employment cannot be based upon forfeiture of the employee's constitutional rights.

It was the differing nature of the property interests claimed by the two terminated college teachers that led the court to sustain one but not the other. As noted earlier in this chapter, tenure gives rise to a property interest. The basic issue then, is whether circumstances other than those generated by contractual or statutory tenure give rise to a property interest.

Roth's unsustained claim was that the mere interest of a public employee in retaining his job was a constitutionally cognizable property interest. Sindermann's sustained claim was that his institution's officially published Faculty Guide, indicating that employment would continue for those who satisfactorily, cooperatively, and enthusiastically went about their duties, gave rise to de facto tenure. This in turn gave rise to a constitutionally cognizable property interest.

Roth and Sindermann provided the conceptual framework within which courts assess liberty and property claims. In addition to clarifying the types of termination that could infringe upon liberty interests, the Court expanded the notion of tenure as property. Constitutionally cognizable property/tenure rights could arise not only through statutory or contractual entitlement, but also through notions of implied contract and the "common law" of the campus,

notions which in turn give rise to the notion of de facto tenure.

The common law of a particular campus may arise from two types of practice.[23] The first, as found in Sindermann, is past practice, a key concept in labor law. To be firmly established, past practice must be a practice "promulgated by management, known of by labor, and accepted by both."[24] The second refers to common law created in practice. "Rather than characterizing it as a management created, labor accepted, and continuously adhered to practice," this judge-made theory "relies upon a community creating a common law in practice."[25] This second realm of campus common law is particularly appropriate to the collegial model of educational institution governance, but to date has not been found by a court to give rise to a constitutionally cognizable property interest.[26] Sindermann, then, though expansive of the notion of property interests, has led to the establishment of outer bounds in judicial practice.

A note is in order on a hidden agenda in these cases. Public employees with property or liberty interests in their

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[23]Bakken, Campus Common Law, 5 J. Law & Ed. 201, 202 (1976).

[24]Id. at 204.

[25]Id. at 205.

[26]Id. at 208.

jobs may not be dismissed without procedural due process; regardless of status, however, they cannot be dismissed at all for an unconstitutional reason. The remedy in the former situation is an administrative hearing, in the latter reinstatement. The distinction between the remedies sought in specific cases is often blurred, and "federal courts hold trial-type hearings in both situations."[27]

> The federal courts have therefore become a de facto "super civil service commission" for all public employees. A public employee, discharged for a reason he considers to be arbitrary and perhaps denied access to an administrative hearing, can use the back door to the federal court. He needs only to add to his due process claim a count alleging dismissal for an unconstitutional reason. Invariably, the court determines that it must give the litigant a full hearing, regardless of whether it finds that he has a Roth-protected liberty or property interest. If the court rules that a dismissal arbitrarily infringed a government employee's liberty or property interest, only a due process hearing and not reinstatement is constitutionally compelled. Such a finding, however, will lend credence to the plaintiff's constitutional claim: a claim which, if proven, will result in the employee's reinstatement.[28]

Still, the Supreme Court is not unconcerned with the hidden agenda:

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[27] Note, supra note 22, at 351.

[28] Id. at 351-52 (footnotes omitted).

> The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions. . . . The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies.[29]

Appropriately or not, public agency personnel decisions made in other contexts have come to the Court's attention. The Court has held that the notion of fundamental fairness does not guarantee striking teachers "that the decision to terminate their employment would be made or reviewed by a body other than the school board."[30] That the hearing portion of procedural due process must be fair was noted earlier. That public employment may not be conditioned upon forfeiture of the employee's constitutional rights was also noted. A teacher, for example, may publicly criticize his board with impunity, provided that such criticism is made without "actual malice," i.e., knowing falsehood or reckless disregard for the truth, or significant adverse effect upon the operation of the school.[31] But what about the finder of fact?

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[29] Bishop v. Wood, 426 U.S. 341, 349-50 (1976).

[30] Hortonville Joint School Dist. v. Hortonville Educ. Ass'n., 426 U.S. 482 (1976).

[31] Pickering v. Bd. of Educ. of Tp. High School Dist., 205, 391 U.S. 563 (1968).

The Supreme Court has held that the school board hearing and thus the nonrenewal itself can be fair.[32] If a teacher shows that protected conduct such as free expression is a "substantial" or "motivating" factor in the decision not to renew, opportunity must be afforded the board to show by a preponderance of the evidence that it would have reached the same personnel decision had the employee not engaged in the protected conduct. Cases of this type show the overlap of substantive and procedural due process issues. As will be discussed in contextual detail, freedom of expression is a substantive liberty protected from state encroachment by the due process clause of the fourteenth amendment.

Nonpublic educational institutions: state action at issue. Before fourteenth amendment restrictions apply to nonpublic educational institutions, of course, state action must be judicially found. Does this necessarily mean, as it does in public educational institutions, that once state action is found the restrictions must apply? One commentator, analogizing to hospital and legal aid society cases, concluded that "even if state action were applied to private institutions, faculty employment rights would not be within

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[32]Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

the ambit of the Fourteenth Amendment's due process and equal protection clauses."[33] It would seem difficult to justify such a position today.

One recent nonrenewal case arising out of a nonpublic medical school would have involved the application of constitutional procedural due process had the threshold issue of state action been resolved in the affirmative.[34] As is typical in such cases, however, state action was not imputed to the nonpublic educational institution. Another nonrenewed instructor alleged denial of due process, but his case was found bereft of constitutional issues; despite showing state aid and regulation of the institution, he could not prove these sufficiently substantial or significant to establish state action.[35]

While not adopted by courts to date, the argument of one commentator would tie the threshold state action question in these cases both to notions of public function and perceptions of professional employment:

> When a university employs janitors, or kitchen workers, or even faculty secretaries, it is not exercising the power or the function that makes it a

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[33]Hendrickson, "State Action" and Private Higher Education, 2 J. Law & Ed. 53, 65 (1973).

[34]Sament v. Hahnemann Medical Coll. Hosp., 413 F. Supp. 434 (E.D. Pa. 1976).

[35]Blouin v. Loyola U., 506 F.2d 20 (5th Cir. 1975). But see Isaacs v. Bd. of Trustees of Temple U., 385 F. Supp. 473 (E.D. Pa. 1974).

> uniquely public institution. When it hires or fires faculty, certain kinds of research personnel and possibly library staff, however, the public character of the institution is directly implicated. Thus academic employment policies should rank rather high on the list of matters open to judicial review; non-academic employment, by contrast, should be regarded in a college or university essentially as it would be treated in a large business firm, private hospital or foundation.[36]

Though he offered it in connection with a plea for greater faculty influence upon institutional policy, another commentator went so far as to assert that the "concept of employer-employee relationship between the administration and the faculty cannot apply" in the academic setting.[37] Should courts adopt these arguments for judicial redefinition of state action in regard to due process issues arising from nonpublic educational institutions, the employment practices of at least some of these institutions would change dramatically. At present, however, courts as a rule do not find state action in nonpublic educational institution employment cases.

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[36] O'Neil, supra note 4, at 189 (footnote omitted).

[37] Kutner, Habeas Scholastica: An Ombudsman for Academic Due Process--A Proposal, 23 U. Miami L. Rev. 107, 130 (1968).

Institutional clients

Constituting the client subsystem of any educational institution are the pupils or students. Several important procedural due process cases in education have been generated by these institutional clients. Several important state action cases within the procedural due process context have been generated by them as well. As with the discussion regarding institutional employees, the contextual focus here shall first be upon public educational institutions, then upon the ostensibly nonpublic institutions whose character gives rise to the threshold state action issue.

Public educational institutions: state action not at issue. The student-institution relationship in higher education, as discussed earlier, was long considered to be grounded in the right-privilege dichotomy and based upon contract. The privilege of attendance at an institution of higher learning was held to be granted pursuant to the student's express or implied agreement to conform with the rules and regulations of the institution. This relationship held for both public and nonpublic postsecondary institutions and for nonpublic elementary/secondary institutions as well. Public elementary/secondary pupils had something of a statutory entitlement to public schooling, but protection of their status likewise had overtones of privilege and likewise lacked constitutional underpinnings. In loco parentis paternalism reinforced the finality of administrative

disciplinary and academic decisions affecting students and pervaded all levels of education, public and nonpublic.

Despite its pervasiveness and legally sanctioned institutionalization, not everyone was happy with the situation:

> Our sense of justice should be outraged by denial to students of the normal safeguards. It is shocking that the officials of a state educational institution, which can function properly only if our freedoms are preserved, should not understand the elementary principles of fair play. It is equally shocking to find that a court supports them in denying to a student the protection given to a pickpocket.[38]

The courts, however, consistently applied the favored attitude. After all, application of the fourteenth amendment must be viewed from two perspectives: what constitutes protections for the student constitutes restrictions for the institution. How could the time-honored notions of the uniqueness and importance of the educational enterprise, institutional autonomy, and judicial deference to educator expertise and judgment be reconciled with the imposing of fourteenth amendment due process restrictions to educational institutions, public or private? Even the United States

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[38]Seavy, Dismissal of Students: "Due Process," 70 Harv. L. Rev. 1406 (1957).

Supreme Court had spoken of attendance at state universities as mere privilege.[39]

Perhaps the first step in "bringing the Constitution to the campus"[40] was the 1948 Congressional legislation eliminating amount of money in controversy as a jurisdictional barrier in cases involving alleged deprivation of civil rights under 42 U.S.C. §1983.[41] A decade later a Federal Court of Appeals judge eloquently dissented from a holding consistent with the long line of expulsion-upholding precedent.[42] The stage was set for one of those "quite exceptional" moments in Anglo-American law where the conceptual force of stare decisis combined with the contextual weight of years of specific on-all-fours precedent gives way to an idea whose time has come; with the rendering of the decision in Dixon v. Alabama State Board of Education,[43] "the law turned 180 degrees."[44]

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[39] Hamilton v. Regents of the U. of Cal., 293 U.S. 245 (1934).

[40] See Wright, The Constitution on the Campus, 22 Vand. L. Rev. 1027 (1969).

[41] Note, The Fourteenth Amendment and University Disciplinary Procedures, 34 Mo. L. Rev. 236, 240 (1969).

[42] Steir v. N.Y. State Ed. Commissioner, 271 F.2d 13 (2d Cir. 1959).

[43] 294 F.2d 150 (5th Cir. 1961).

[44] Wright, supra note 40, at 1028.

In 1960, several black students of Alabama State College took part in civil rights demonstrations in Montgomery. They were shortly thereafter summarily expelled by the Alabama State Board of Education. The students brought suit in federal district court alleging that such expulsion violated their fourteenth amendment right to procedural due process. Predictably, the district court dismissed the complaint. The students appealed.

The Fifth Circuit Court of Appeals, eschewing judicial restraint in educational matters, held in Dixon that notice and opportunity for a hearing were conditions precedent to any constitutionally valid expulsion from a state institution.

The court spoke generally of protected interests, but was careful not to imply that all the formalities of criminal due process were required. Rather, it expounded general requirements of fundamental fairness, stating that the particular "minimum procedural requirements" in a given case would be contingent upon "the circumstances and the interests of the parties involved."[45] Further judicial development has clarified this. Generally, for example, there is no right to confront or cross-examine witnesses,[46] and no right

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[45] 294 F.2d 150, 155 (5th Cir. 1961).

[46] See Esteban v. Central Mo. St. Coll., 277 F. Supp. 649 (W.D. Mo. 1967).

to counsel,[47] though these and other requirements adopted from criminal procedure and adapted to the exigencies of administrative procedure may be imposed if the student is threatened with grave loss.[48] Generally, there are four basic safeguards:

> First, the student must be given timely notice of the charges against him. Second, the student must be notified regarding the nature of the evidence against him. Third, he must be able to present his own defense, which may, under some circumstances, include the presentation of witness, affidavits, and exhibits on his behalf. Finally, the student must be punished only on the basis of substantial evidence.[49]

Procedural fundamental fairness, then, goes not only to opportunity to be heard, but to be heard by an impartial finder of fact.[50]

The novel rule of Dixon should bring to mind the discussion of the relationship between equal protection and due process. It was noted that courts have generally been more likely to find state action in racial discrimination cases

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[47] Id.

[48] General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education, 45 F.R.D. 133, 147-48 (W.D. Mo. 1968).

[49] Note, The State University, Due Process and Summary Exclusions, 26 Hast. L. J. 252, 257 (1974).

[50] Johnson, Due Process Requirements in the Suspension of Dismissal of Students from Public Educational Institutions, 5 Capital U. L. Rev. 1, 29 (1976).

based upon equal protection than in cases based upon due process. Though Dixon involved a state institution so that direct state action resolved the threshold state action issue on its face, perhaps the court was willing to abandon due process precedent in order to protect the black students involved. The language of the case was not limited, however; race became irrelevant.

Though the Supreme Court refused to hear it, this watershed case, by reversing the long-standing tide of judicial precedent, became itself the singular authority in the area. Later higher education cases followed Dixon not only where expulsion was involved but also where indefinite,[51] long-term,[52] or interim[53] suspensions were ordered. Dixon's applicability to public elementary/secondary institutions and nonpublic educational institutions was addressed by later courts. The former will be discussed directly below, the latter in the next section.

Although Dixon did not provide specific precedential authority, federal courts generally adopted its rationale and holding in dealing with public elementary/secondary school expulsions. One court pointed to the relative

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[51] Knight v. State Bd. of Educ., 200 F. Supp. 174 (M.D. Tenn. 1961).

[52] Scoggin v. Lincoln U., 291 F. Supp. 161 (W.D. Mo. 1968).

[53] D.P. Young, The Yearbook of Higher Education Law 1977 101 (1977).

inexperience and immaturity of elementary/secondary pupils in asserting that they needed procedural due process even more than college students.[54]

Not all expulsions require a school board hearing as part of the process due, however. After more than a score of serious infractions of discipline over a two-year span by one pupil, a junior high school principal filed a petition in the juvenile court in lieu of the usual board hearing procedure. In dismissing the due process challenge, the court held that, in view of frequent conferences between the principal and parent and child and adequate notice of disciplinary actions and the court hearing, the procedure used served the best interests of the pupil and protected his rights.[55]

Whether the rationale of the expulsion cases could be applied to public elementary/secondary pupil suspensions was a question decided differently by different courts. The Supreme Court chose to settle the matter in Goss v. Lopez.[56]

The conceptual precedent for Goss was not so much Dixon as Board of Regents v. Roth, the important public

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[54]Sullivan v. Houston Ind. School Dist., 307 F. Supp. 1328, 1343 (S.D. Texas 1969).

[55]Smith v. Webb, 420 F. Supp. 600 (E.D. Pa. 1976).

[56]419 U.S. 565 (1975). See also Wood v. Strickland, 420 U.S. 308 (1975).

employment case. Accordingly, the key was the pupil's statutory entitlement to public schooling. This, the Court reasoned, gave rise to a property interest. Proposed deprivation of that interest would necessarily trigger procedural due process prior to deprivation. Even suspensions of less than ten days would deprive the pupil of his interest in public education, so would require procedural due process. Moreover, suspensions could implicate reputation, and thus involve protected liberty interests.

Typical due process flexibility was built into the scheme, as the Court recognized the administrative problems inherent in such a requirement. Thus, in balancing the interests of the pupil against the interests of the state in the operation of its schools, the court held that in suspensions of ten days or less the pupil must first be given oral or written notice of the charges against him. If he denies them, he must then be given an explanation of the evidence the school authorities have. Then he must be given an opportunity to present his side of the story.

The Court noted that no delay is necessary between the giving of notice and the holding of the informal hearing. Students whose continued presence at school would be dangerous or disruptive can even be summarily removed from school, provided that the required notice and hearing be held as soon thereafter as practicable. This kind of flexibility reflects the same interest balancing that ensures that the

more the pupil stands to lose, the more formal will be the procedures required prior to him losing it.

With this flexibility in mind, it is appropriate to turn to the important corporal punishment case, Ingraham v. Wright.[57] Though known more for its holding that corporal punishment in the public schools does not constitute "cruel and unusual punishment," Ingraham also dealt with the question of procedural due process in the corporal punishment situation.

The Court held that corporal punishment does in fact implicate a constitutionally protected liberty interest, but the traditional common law remedies for abuse are fully adequate to afford due process. No advance procedural safeguards are required; the cost and impracticality outweigh any marginal benefit for the student. This striking of the interest balance in favor of the state perhaps reflected an additional observation by the court that no property right was implicated, since corporal punishment would not interrupt a pupil's education.

Procedural due process issues not involving discipline also arise out of the treatment of students by educational institutions. Placement of mentally retarded youngsters, for example, has been held to require procedural due process.[58]

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[57] 430 U.S. 651 (1977).

[58] See Mills v. Bd. of Educ., 348 F. Supp. 866 (D.D.C. 1972).

Academic, as well as disciplinary decisions of educators may very well involve procedural due process.

The most important recent case on point is Board of Curators of the University of Missouri v. Horowitz.[59] The plaintiff-student alleged denial of procedural due process prior to her dismissal for academic deficiencies from a public medical school. After dealing with the issue of the requisite constitutionally cognizable interests, the Court declared that in placing the student on academic probation pending improvement in clinical performance and in enlisting seven practitioners for her evaluation, the school afforded her at least as much process as she was due.

The Court noted also that the decisions of educational administrators in disciplinary matters are essentially different from decisions in academic matters. The latter call for subjective judgment and expert evaluation for which judicial and administrative reviewing processes, appropriate in disciplinary matters since the vitiation of in loco parentis, are inadequate. The Court thus reaffirmed, in the context of academic decisions, the traditional judicial restraint absent a clear showing of arbitrariness.

Nonpublic educational institutions: state action at issue. The issue of state action is the threshold issue in

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[59] 435 U.S. 78 (1978).

due process cases involving either institutional employees or clients. If judicial redefinition of state action in regard to due process issues in nonpublic educational institutions has occurred or is occurring, it should be detected here. The general notions of policy and the specific notions of state action categories should also be relevant.

Just as student civil rights activism brought the Constitution to the public campus in the landmark 1961 Dixon case, student antiwar activism later in the 1960's and early 1970's precipitated a number of cases in which the student-plaintiffs sought to bring the Constitution to the nonpublic campus. The threshold issue in these due process cases was, of course, state action.

The first important case to arise out of this milieu was Grossner v. Trustees of Columbia University.[60] The major participants of the infamous April, 1968, riots at Columbia sought a federal district court injunction against the university's disciplinary response. Suing under 42 U.S.C. §1983, the students sought to identify the state action required for federal court jurisdiction. They alleged that state action arose from Columbia's receipt of substantial federal and state aid and from its performance of a public function.

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[60] 287 F. Supp. 535 (S.D. N.Y. 1968).

The court found no state action. First, it noted that most of the aid received by Columbia was federal, and thus of no consequence for the issue of state action. Second, and more basic, the court held that even substantial state aid by itself would not give rise to state action by the recipient institution. Third, it noted that the state was in no way directly involved in the particular disciplinary actions being attacked. Finally, the court rejected the public function argument on the basis that the university did not fall into the traditional Marsh mold.

Grossner provided precedent for Powe v. Miles.[61] The ostensibly nonpublic educational institution was Alfred University. One of the four colleges making up the university was the New York State College of Ceramics, founded by the state but administered pursuant to contract by the university at state expense.

Seven students, four from the Liberal Arts College and three from the Ceramics College, were suspended for disrupting an R.O.T.C. commissioning ceremony. They sued, alleging denial of procedural due process. The court issued a dual holding illustrative of traditional judicial treatment of the public-nonpublic dichotomy.

Following Grossner, the court held that the four students from the Liberal Arts College were not

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[61] 407 F.2d 73 (2d Cir. 1968).

constitutionally entitled to procedural due process because the university was not engaging in state action in disciplining them. The rationale was that the state involvement represented by support for the Ceramics College did not in turn transform all university administrative action into state action. Applying the developed mode of state action analysis, the court declared that the state "must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff"[62] but with the specific activity causing the alleged injury.

The university did have to afford due process to the three Ceramics College students, however. That portion of the university was an instrumentality of the state; its actions were state action.

A third case generated by student activism was Browns v. Mitchell.[63] Several students of the nonpublic University of Denver were suspended by the Board of Trustees for demonstrating in an area of the university not open to the public. The hearing committee which investigated the matter had recommended probation, however. The students alleged that the university was acting under color of state law and therefore was constitutionally remiss in denying full procedural due process.

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[62] Id. at 81 (emphasis added).

[63] 409 F.2d 593 (10th Cir. 1969).

The specific arguments alleging state action were based upon public function and state involvement through regulation and aid. The court dismissed the public function argument by pointing out that the demonstrations took place in areas not open to public use. The regulation argument was also rejected since mere incorporation by the state as a nonprofit, nonpublic, tax exempt educational institution did not amount to the requisite substantiality of regulation. The court dismissed the aid argument as well, though its primary thrust was tax exemption rather than the more usual forms of aid.

The 1970's brought a new decade and more procedural due process suits by students against nonpublic educational institutions. In Coleman v. Wagner College,[64] expelled students attempted to show that state action arose from a state statute requiring every college in the state to file with the state rules and regulations for maintenance of public order on campus. The court stated that a requirement of mere filing would not give rise to state action, but if in operation such a statute represented meaningful state intrusion into the determination of the substance of the rules and regulations, then state action would arise. State action was possible.

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[64] 429 F.2d 1120 (2d Cir. 1970).

It could be argued that this case, along with Reitman v. Mulkey, the California real property discrimination case, could provide precedent for the expansion of the state action concept in certain cases. For example, these could be affirmatively dispositive of the state action issue in cases of discipline in nonpublic Indiana colleges and universities because of that state's statute expressly placing unbridled disciplinary discretion in the hands of nonpublic administrators.[65]

In a case running even more strongly counter to the earlier holdings of no state action, a federal district court distinguished the earlier cases and held that state chartering of a nonpublic university carried with it a duty to perform the authorized public function.[66] The defendant chancellor's failure to attempt in earnest to prevent disruption of classes by demonstrators precipitated the suit and the duty rationale. Significantly, the judge, having found state action in a way unprecedented in due process education cases, and in equal protection cases other than the anomalous 1962 Guillory case, himself recommended that the defendant chancellor appeal his decision. The defendant

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[65] See Note, Legislative State Action and Indiana Private Universities, 9 Val. L. Rev. 611 (1975); cf. Haverford Coll. v. Reeher, 329 F. Supp. 1196 (E.D. Pa. 1970).

[66] Belk v. Chancellor of Washington University, 336 F. Supp. 45 (E.D. Mo. 1970).

never did appeal the case and the case never did appeal to subsequent courts as precedent.

The courts returned to the Grossner approach in Blackburn v. Fisk University.[67] There the court repeated the holding that the mere chartering, providing of institutional aid or granting of tax exemption by the state did not individually or cumulatively give rise to state action. Allegations that state-granted power of eminent domain gave rise to state action generally or that the university was essentially a self-contained community tantamount to the Marsh company town were likewise rejected.

A secondary school case of the same year, Bright v. Isenbarger,[68] adopted the reasoning of Grossner and Blackburn, higher education cases. Two expelled pupils suing under 42 U.S.C. §1983 for reinstatement to a nonpublic parochial high school could not sustain their burden of proving state action. Commissioning of the school by the State Board of Education was held not to be sufficiently substantial regulation or sufficient involvement for the actions of school officials to be imputed to the state.

Another case dealt with expulsion of students for academic deficiencies. In Grafton v. Brooklyn Law School,[69]

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[67] 443 F.2d 121 (6th Cir. 1971).

[68] 445 F.2d 412 (7th Cir. 1971).

[69] 478 F.2d 1137 (2d Cir. 1973); cf. Ryan v. Hofstra U., 324 N.Y.S.2d 964 (Sup. Ct. 1971).

the expelled students sued for reinstatement, alleging state action. The opinion, written by Judge Friendly, erudite author of Powe v. Miles and a book dealing with the problems of the public-nonpublic dichotomy, not only rejected the plaintiffs' familiar claims of state action, but also expressly rejected allegations that judicial redefinition of state action had occurred, at least within the public function category.

A final, more recent case arose from a nonpublic, nonsectarian school.[70] The pupil was expelled for drug use, but could not overcome the threshold state action issue when suing for reinstatement under 42 U.S.C. §1983. This 1976 case is noteworthy because counsel for the plaintiff, apparently realizing that judicial redefinition of state action in regard to due process issues in nonpublic educational institutions had not occurred and was not occurring, pleaded several alternative causes of action. These were based on implied contract, an estoppel theory based on past practice, and an unusual allegation that the school acted in excess of its in loco parentis authority when it expelled the pupil.

Review of the cases indicates that judicial redefinition of state action in regard to due process issues in

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[70]Wisch v. Sanford School, Inc., 420 F. Supp. 1310 (D. Del. 1976).

nonpublic educational institutions is not apparent in either institutional employee or institutional client procedural due process cases. Though these are the more common cases, and generally reflective of state action evolution, it remains to be investigated whether redefinition has occurred or is occurring in substantive due process cases involving the employees or clients of nonpublic educational institutions.

Substantive Due Process

The Pierce Compromise led at least one commentator to ask whether the due process afforded nonpublic educational institutions is in turn afforded their students. In terms of procedural due process, the question formed the basis for the sections just concluded. It remains to be addressed in terms of substantive due process, that operational form specifically involved in Pierce.

Substantive due process, it will be recalled, deals both with Bill of Rights liberties made applicable to the states and with the reasonableness of laws, rules, or regulations. These areas overlap. At the outset of this contextual discussion it is also worthwhile to note that:

> The fourteenth amendment is, of course, only a limitation on college power. That is, college rules do not derive their authority from the fourteenth amendment, and no college need show that its rule-making power is authorized by the fourteenth amendment. The point is mild and self-evident, but extremely important;

> those who would seek to displace or invalidate a college rule by reliance upon the fourteenth amendment must sustain the burden of showing in what manner a given college rule or action is forbidden by or conflicts with the ultimate norms of the fourteenth amendment.[71]

These observations are valid for elementary/secondary as well as postsecondary educational institutions, and for nonpublic educational institutions judicially found to be engaged in state action as well as public institutions. Furthermore, both institutional employees and institutional clients are implicated.

Institutional employees

Since the functionally most important employees of educational institutions are teachers, substantive due process issues centered upon academic freedom form the basis of several important cases. As a rule courts have traditionally been reluctant to intrude into such matters,[72] but judicial restraint is never wholly unbounded.

In Meyer v. Nebraska,[73] the Supreme Court struck down a statute proscribing the teaching of foreign languages to pupils below ninth grade in either public or nonpublic

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[71] Van Alstyne, The Judicial Trend Toward Student Academic Freedom, 20 U. Fla. L. Rev. 290 (1968).

[72] K. Alexander & E. Solomon, College and University Law 344 (1972).

[73] 262 U.S. 390 (1923).

schools. A nonpublic school teacher attacked the statute as unconstitutional direct state action. By infusing fourteenth amendment "liberty" with substance, the Court determined that the statute violated the teacher's right to teach.

More specific questions of Lehrfreiheit have been addressed by the Court. Loyalty cases solidified protection for teachers from vague or overbroad loyalty statutes, applying the substantive standard that men of common intelligence must not be required to guess at a statute's meaning.[74] Public employees cannot be dismissed for exercising their free speech rights,[75] nor for exercising free association rights such as those connected with unionism,[76] nor for exercising their privilege against self-incrimination where their competence is not at issue,[77] nor for refusing to swear to oaths clear in meaning but clear also in their chilling effect upon basic associational or expression rights.[78]

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[74] Baggett v. Bullitt, 377 U.S. 360 (1964).

[75] Pickering v. Bd. of Educ., 391 U.S. 563 (1968). See also Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969).

[76] McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968).

[77] Slochower v. Bd. of Higher Educ., 350 U.S. 551 (1956); Beilan v. Bd. of Educ., 357 U.S. 399 (1958).

[78] See Connell v. Higgenbotham, 403 U.S. 207 (1971); Elfbrandt v. Russell, 384 U.S. 11 (1966).

It was in this context that the Supreme Court ringingly reaffirmed a value educators hold most dear:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us. . . . that freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.[79]

The Court again stressed this view in Epperson v. State of Arkansas.[80] There the Court considered an attack on a statute proscribing the teaching of evolution in public schools. The case turned on the establishment clause, but involved more. As in Meyer, it was the teacher who risked running afoul of the criminal statute's provisions, and again as in Meyer, the statute was not allowed to stand.

Substantive due process cases have arisen in other contexts involving employees of educational institutions. A board requirement that all pregnant teachers suspend their teaching duties at some specific and thus arbitrary chronological point in their pregnancy, regardless of the capacity of individual teachers to perform their duties beyond that point, violates substantive due process.[81] It is the irrebuttable presumption of incapacity that is fundamentally unfair.

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[79] Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

[80] 393 U.S. 97 (1968).

[81] Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

In a case reminiscent of Pierce, the Court struck down a Mississippi school board attempt to compel public school attendance by children of public school teachers.[82] The essence of the Pierce Compromise was reaffirmed.

A final recent case dealing with employee substantive due process concerns nonteachers. A school board policy proscribed the wearing of beards or mustaches, regardless of how neat and trimmed, by school bus drivers.[83] Applying traditional substantive due process analysis, the court held the policy to lack any rational relationship with a proper school purpose. The issue of liberty interests in personal appearance has been a perplexing one for courts. This has been particularly true in regard to institutional clients, discussed in the next section.

Although the courts have begun to deal with substantive due process issues concerning institutional employees, nearly all such cases come from the public sector. Thus, though this section has shed contextual light upon the operation of substantive due process, it has done little to illuminate the question of state action redefinition. If this limitation attaches as well to substantive due process cases involving institutional clients, then conclusions regarding judicial redefinition of state action in regard

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[82]Cook v. Hudson, 429 U.S. 165 (1976).

[83]Pence v. Rosenquist, 573 F.2d 395 (7th Cir. 1978).

to due process issues in nonpublic educational institutions will have to be based upon procedural due process case law exclusively. Such a constraint would not limit the validity of those conclusions, despite a logical inference from the organization of Chapters IV and V that it could; if state action be redefined in procedural due process cases, future substantive due process cases arising out of ostensibly nonpublic educational institutions would reflect that redefinition.

Institutional clients

Lernfreiheit, student academic freedom, was implicit in the Meyer and Epperson curriculum cases, and in Pierce as well. Narrowly construed as the right to learn in an academic atmosphere unduly constrained by an imposed orthodoxy,[84] it has not generated many cases, however. In fact, substantive due process is only infrequently the basis of suits brought by institutional clients;[85] such claims prevail even less frequently.[86]

Reasonable rules and regulations related to student conduct may be reasonably enforced by educational

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[84]West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[85]Developments in the Law--Academic Freedom, 81 Harv. L. Rev. 1045, 1147 (1968).

[86]Note, 44 Cin. L. Rev. 393, 397 n.25 (1975).

administrators. Discretion is inherent in the exercise of the power both to promulgate rules and regulations and to choose the means of their enforcement. The source of a student's right to challenge such exercises of administrative discretion, at least in public educational institutions, "rests in the court's power to forbid ultra vires actions by public officials."[87] Promulgation of arbitrary rules or regulations and employment of arbitrary means of enforcement are ultra vires acts because by their unreasonableness they abridge substantive due process rights.

As with statutes affecting teacher conduct, rules and regulations dealing with student conduct must be clear. They must, for example, be sufficiently clear to give adequate notice of what conduct will trigger a disciplinary response.[88] A recent case illustrates this point.

In Mitchell v. King,[89] the challenged school board policy authorized expulsion of any student found guilty of "conduct inimical to the best interests of the school." The court held this violative of a pupil's substantive right to fundamental fairness because the policy included no express standards of conduct to guide pupil behavior. As with

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[87] Developments, supra note 85, at 1147.

[88] Speake v. Grantham, 317 F. Supp. 1253 (S.D. Miss. 1970).

[89] 363 A.2d 68 (Conn. 1976).

employee oaths, such policies must not lack "terms susceptible of objective measurement."[90]

Through incorporation of certain Bill of Rights liberties, fourteenth amendment substantive due process protects the basic constitutional rights of students. Just as Dixon was the watershed student procedural due process case, Tinker v. Des Moines Independent Community School District[91] was the landmark case requiring protection of student substantive due process rights. Students who had worn black armbands in school as a protest against the Vietnam war were consequently suspended. The Court, noting that students and teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," seriously eroded the in loco parentis authority of school administrators. Even so, that authority still extends to abridgment of student free expression; it can be exercised, however, only when the administrator reasonably can forecast "substantial disruption of or material interference with school activities." It is the reasonableness of the forecast, measured in light of the particular circumstances, that determines the legitimacy of such administrative action.[92]

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[90] Cramp. v. Bd. of Public Instr., 368 U.S. 278 (1961).

[91] 393 U.S. 503 (1969).

[92] See, e.g., Guzick v. Drebus, 431 F.2d 594 (6th Cir. 1970).

Personal appearance can be one form of expression. The Tinker standard applies to regulation of student appearance when it is of a communicative nature. When aspects of student personal appearance such as male hair length are regulated, courts differ in their approach to the regulation. In Jackson v. Dorries,[93] for example, the court upheld such regulation as productive of proper decorum and discipline. By contrast, the court in another non-expression case of the same year, Richards v. Thurston,[94] held that hair regulation was not reasonably related to decency, decorum or good conduct in schools and thus violated without justification the liberty of students.

Free exercise of religion is a basic liberty of students and their parents not to be unreasonably abridged by school administrators. Pierce may be viewed from this perspective since it permitted operation of parochial schools. Free exercise of religion is related, of course, to one's constitutionally protected "sphere of intellect and spirit" which underlies Tinker and the earlier case proscribing compulsory flag salute in public schools, West Virginia State Board of Education v. Barnette.[95]

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[93] 424 F.2d 213 (6th Cir. 1970).

[94] 424 F.2d 1281 (1st Cir. 1970).

[95] 319 U.S. 624 (1943).

In Wisconsin v. Yoder,[96] the Supreme Court held that the free exercise interests of the Amish outweighed the parens patriae argument of the state in regard to compulsory secondary education. The state had contended that its obligation to watch over the interests of those too young to manage their own affairs was the more important interest in this policy area. Interestingly, as in Meyer and Pierce, the liberty focus of the court was upon the parents rather than the school children themselves. The partial dissent by Justice Douglas brought this out. Nonetheless, the fact remains that even after Tinker, because of the particular parties to a suit or other reasons, the focus of substantive due process cases does not necessarily comport with that of procedural due process cases arising out of the school setting.

Students have the substantive right to be protected from unreasonable searches and seizures because of fourteenth amendment due process incorporation of the fourth amendment. Due to the nature of educational institutions and the exigencies of common search situations, the standard governing such exercise of in loco parentis authority is one of "reasonable suspicion."[97]

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[96] 406 U.S. 205 (1972).

[97] See, e.g., People v. Jackson, 319 N.Y.S.2d 731 (1971).

Finally, in addition to rules and Bill of Rights questions, substantive due process protects students as well as teachers from unreasonable irrebuttable presumptions. Vlandis v. Kline[98] dealt with state residency requirements for purposes of charging tuition and fees to a public university. The state may not, consistently with substantive due process, irrebuttably presume that a student, originally from another state, will not establish residency within the state.

As with cases dealing with the substantive due process rights of institutional employees, these cases have arisen out of public educational institutions. The earlier comments concerning conclusions regarding state action re-definition based exclusively upon procedural due process cases thus apply. Those conclusions form the basis of Chapter VI.

Summary

Contextual perspective on due process begins with focus upon specific procedural and substantive due process cases arising out of public and nonpublic educational institutions in light of the broader milieu of cultural norms and the narrower milieu of institutional norms. State

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[98] 412 U.S. 441 (1973).

action is a matter of contention only in procedural due process cases arising out of ostensibly nonpublic educational institutions, and more often involve institutional clients than institutional employees.

CHAPTER VI

CONCLUSIONS

Introduction

Through investigation of the state action and due process concepts in detail, this study has served to clarify the issues going to both the heart and the periphery of the central inquiry: whether there has occurred or is occurring judicial redefinition of state action in regard to due process issues in nonpublic educational institutions. Briefly, the major conceptual issue in state action cases is whether fourteenth amendment restrictions will be triggered by a finding of state action as a matter of law. The major contextual issue in due process cases in nonpublic educational institutions specifically is whether the courts can discern sufficient connection between the nonpublic activity in each case and the state to support a finding of state action as a matter of fact. The overriding policy issue is the extent to which federal constitutional restrictions should be a hedge upon private actions. The specific legal-policy issue is the extent to which federal constitutional restrictions do or should circumscribe the practices and policies of administrators in nonpublic educational institutions.

Analysis of these issues has shown that there has not occurred nor is there occurring expansive judicial redefinition of state action in regard to due process issues in nonpublic educational institutions. It would seem, moreover, that the present Burger Court is, if anything, contracting the Warren Court's redefinition to a limited degree. This basic conclusion is noteworthy, but should be seminal rather than terminal.

Even if, as the study indicates, there has not been expansive judicial redefinition of state action in regard to due process issues in nonpublic educational institutions, conclusions concerning implications of such a redefinition for educational administration are important. The reasons are twofold.

First, given the history of the state action concept and judicial privity to the course of American philosophical evolution and social, political, economic, and educational development, future judicial redefinition of state action could make fourteenth amendment restrictions applicable to theretofore nonpublic educational institutions. Second, even if the state action concept is not extended by judicial redefinition, the administration of nonpublic educational institutions could reflect independent institutional adoption of that degree of procedural and substantive due process constitutionally required of their public counterparts.

Rationales underlying this latter reason are several. Certain interest groups connected with the institution, for example, may desire that students and faculty be given protections comparable to those constitutionally required of public institutions. The board of trustees may wish to forestall or respond to faculty and staff collective bargaining pressures. The board, administration, faculty, and alumni may see institutionalizing of due process as a way to attract, or at least not discourage, prospective students in an era of retrenchment, declining enrollments, and fierce interinstitutional competition for students.

Other rationales underlying independent implementation of due process include the basic desire of administrators to implement such practices in order either to obviate lawsuits which could result in judicial redefinition of state action, or to have such practices already institutionalized should such redefinition occur. Another rationale is that institutionalizing of procedural due process may be a condition precedent to receipt of state, federal, foundation, or other outside funding.

Perhaps the most compelling rationale, however, is normative: due process is a legal concept, and is required in public educational institutions, because it is based upon the societal norm of fundamental fairness as an operational ideal. With this in mind, then, broader discussion of conclusions and implications of this study is in order.

Implications for Educational Administration

The premise upon which dissertations substantively similar to this one are based is that conclusions may be drawn concerning the interrelation of two basic societal institutions, law and education. It is the writer's contention that conclusions based upon the particular interrelation discussed in the foregoing chapters will be more meaningful if approached within the same analytical framework as the study itself. Toward this end, conclusions will be drawn through analogy to the distinction between the two types of conclusions drawn in the judicial process. These are termed conclusions of law and conclusions of fact, focusing upon the conceptual and contextual elements of an issue, respectively. Not coincidentally, judicial finding of state action represents both types of conclusions.

Use of such an analytical framework does not presuppose a strict dichotomy of concept and context, however. Indeed, despite a logical inference drawn from the organizational scheme of the foregoing chapters, any strict dichotomy of concept and context is illusory, both in law generally and in any analysis of the interrelation of law and education.

The functioning of law and the functioning of educational institutions, moreover, are interrelated much as the conceptual and contextual elements within each are interconnected. This notion is basic to the premise underlying

this and similar dissertations, and provides the particular framework within which two variations of the fundamental concept/context distinction may foster analysis and conclusions.

The Functioning of Law: "Law in the Books" and "Law in Action"

Roscoe Pound's concept/context distinction applies both to the question of whether the enacted law comports with prevailing behavior patterns and to the question of whether the express aims of a statute comport with its actual effects.[1] For purposes of this analysis, the latter possible discrepancy is less important, as it applies in narrowly circumscribed areas such as procedural due process provisions of federal aid to handicapped children legislation.[2] The following analysis will therefore focus primarily upon the former possible discrepancy, to determine whether court-mandated standards of procedural and substantive are being met in practice or would be if judicial redefinition of state action in regard to due process issues in nonpublic educational institutions mandated those standards in those institutions.

Law undeniably has a normative aspect. Indeed, a whole respected school of philosophical jurisprudence takes as

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[1] E. Schur, Law and Society 39 (1968).

[2] 20 U.S.C. §§1401 et seq.

its starting point the notion that law itself is the unity of a normative order.[3]

This conceptual apparatus is translated into operation, affecting the day-to-day existence of people and institutions, but something is lost in the translation. Even in less cynical times than our own, it has been clear that imperfection inheres in going from the ideal to the real. Beyond the basic metaphysical and epistemological divisions traditionally extant lies, it is submitted, this basic truth.

The application of the sometimes vague, usually broad, and always authoritative language in opinions of the United States Supreme Court is frequently vexing for the lower courts bound to apply it. For example, the liberty and property tests in Roth and Perry "have not proven to be easy for the lower federal courts to apply."[4] This problem is exacerbated whenever the Court itself is split, with concurring or dissenting opinions in a given case.

Specific application by lower courts of the Supreme Court's decisions regarding state action and due process generates these kinds of problems. Furthermore, lurking behind it all is the persistent power of the tradition of judicial restraint in dealing with education. Though

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[3] See H. Kelsen, General Theory of Law and State (1961).

[4] Note, The Due Process Rights of Public Employees, 50 N.Y.U. L. Rev. 310, 343 (1975).

certainly no longer the almost unassailable barrier it once was, it still cannot be ignored.

The next step is the most important in going from the ideal to the real, the conceptual to the contextual. That step shifts the focus to line administrators who must interpret, in light of their own institutions and narrower milieu, the opinions of not only the Supreme Court, but the lower courts as well. An apt analogy can be made to the critical responsibility of line administrators, especially those closest to the technical level of the institution, in collective bargaining contract maintenance. By interpreting and applying the contract language, often in light of past practice or the exigencies of the moment, educational administrators set precedent.

An important variable is the extent to which institutions comply with reasonably clear court mandates. Consider, for example, what would happen if the Supreme Court held today, in a case arising out of an ostensibly nonpublic educational institution, that state action arises from state tax exemption by itself. All tax exempt institutions would therefore have to provide procedural and substantive due process to employees and clients.

Some nonpublic educational institutions undoubtedly already provide as much process as is Constitutionally due employees and clients of public institutions, but many undoubtedly do not. Would those which do not so provide

implement potentially expensive procedural due process machinery for students, or for faculty and other employees, or alter institutional prerogatives of internal governance if required, or modify institutional purpose if necessary for full compliance?

No one can say for certain, of course, but,

> the decisions of the Court, far from producing uniform impact or automatic compliance, have varying effects--from instances in which no action follows upon them to wide degrees of compliance (usually underreported), resistance, and evasion.[5]

Other commentators suggest that the impact of the Supreme Court has been less than total because of lower court autonomy, elite unresponsiveness, and public unawareness.[6]

Complete, good faith compliance, then, cannot be assumed. Some of the explanations for this focus upon administrators perceiving court mandates as "educational counterproductive, a threat to their authority, inconsistent with their professional status and self-image, and at odds with community and institutional values."[7]

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[5] S. Wasby, The Impact of the United States Supreme Court: Some Perspectives (1970).

[6] Levine & Becker, Toward and Beyond a Theory of Supreme Court Impact, 13 Amer. Behavioral Scientist 561 (1970).

[7] D. Kirp & M. Yudof, Educational Policy and the Law 183 (1974).

Resistance or evasion demonstrates

> the inability of courts to impose on complex social organizations values and purposes inconsistent with institutional norms and individual and bureaucratic perceptions. This inability to change schools, reach into the minds of administrators . . . and review the myriad minor punishments applied to nonconforming students might be viewed as arguing for judicial abstention. The futility of "paper decrees" and the uncertainty over the propriety of judicial interference with democratic educational policy choices are powerful arguments for judicial restraint.[8]

Compliance of nonpublic educational institutions, i.e., of administrators in them, with expansive judicial redefinition of state action in regard to due process issues is something that would vary widely. The "law in the books" and the "law in action" are two different matters.

The Functioning of Educational Institutions: Theory and Practice

As pointed out in the introduction to Chapter III, administrative theory is fleshed out in administrative practice. Conceptual frameworks designed to describe and explain or predict general or specific behavior in organizations such as educational institutions are to varying degrees helpful in fostering effective administrator

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[8] Id. at 185-86.

behavior. The following analysis of some of the ways due process fits within theoretical formulations and with administrative practice further will explicate the implications of this study for educational administration.

An educational institution, it has been noted, may be viewed as a social system. Like other open systems, the institution may thus be considered a whole comprising a synergistic set of interrelated and interacting parts, in turn interacting with the environment.

A helpful social systems model of an organization and organizational behavior is that first proposed by Getzels and Guba.[9] Two basic dimensions, the nomothetic and the idiographic, constitute an organization. The nomothetic dimension comprises the formal organizational component, i.e., task achievement related to institutional goals, and structure as defined by roles and role expectations. The idiographic dimension comprises the personal component, i.e., personal needs satisfaction of organizational members. The two dimensions are "at once conceptually independent and phenomenally interactive."[10]

Affecting both basic dimensions is the cultural dimension comprising societal norms and values. These influence

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[9]Getzels & Guba, Social Behavior and the Administrative Process, 65 The School Rev. 423 (1957).

[10]J. Getzels, J. Lipham, & R. Campbell, Educational Administration as a Social Process 56 (1968).

behavior in organizations. The interaction of the three dimensions can generate varying degrees of institutional goal achievement and individual needs satisfaction, depending upon the degree of dimension congruence.

The interaction can similarly generate conflict within the organization. Due process, it should be noted, may be viewed as a conflict prevention device as well as a conflict resolution device. Even so, not all conflict is dysfunctional, but it is important to recognize that this social systems model can explain the source of conflict and indicate generally whether due process is implicated. This is achieved through explicit recognition of the fact that Max Weber and Frederick Taylor underemphasized: organizations are peopled. It is through this recognition that the social systems paradigm is helpful. It undergirds, for example, that conceptual amalgam of goal achievement notions and personal needs satisfaction notions termed organizational climate.

Pupil control ideology is one conceptualization of organizational climate.[11] The focus is upon the alienation of institutional clients, generally in elementary and secondary schools. Characterization of climate ranges from custodial to humanistic; those schools with a more humanistic climate seem better to achieve the twin goals of

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[11] See D. Willower, T. Eidell, & W.K. Hoy, The School and Pupil Control Ideology (Penn State Studies Monograph No. 24, 1967).

educating pupils and fostering harmonious relations among pupils, teachers, and administrators.

Due process, both procedural and substantive, would seem more consistent with a humanistic climate. Administrative practice incorporating due process would in turn seem more likely to reap better degrees of goal attainment by eliminating a custodial element. The nonpublic school administrator, whether or not required because of state action redefinition to abide by due process standards, would be hard-pressed to justify denial of procedural or substantive due process on educational grounds. Not unlike the surgeon who performs dangerous operations with marginal skills, such an administrator jeopardizes the success of the operation.

Another conceptualization of organizational climate focuses upon institutional employees, specifically upon the relationship between teachers and administrators.[12] Characterization of climate ranges from closed to open. Those institutions at all levels with a more open climate tend to have fewer problems of motivation, morale, and job satisfaction.

Procedural and substantive due process would seem more consistent with the more open climate. The administrator of the nonpublic educational institution would seem more

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[12] See A. Halpin, Theory and Research in Administration (1966).

likely to be effective in fostering motivation, morale, and job satisfaction once due process becomes part of his administrative behavior.

These considerations of organizational climate, motivation, morale, and job satisfaction relate to another notion of administrative theory, compliance.[13] This is compliance within institutions, rather than the compliance of institutions discussed in the preceding section. The key to Etzioni's theoretical formulation lies in the type of power used by an organization to induce organizational members to comply and the type of involvement of those members within the organization. It would seem that due process is consistent with the effective normative-moral compliance pattern of power and involvement. The values associated with academia which fostered the tradition of judicial restraint in educational matters would seem also naturally to evoke both a normative-moral compliance pattern and a due process component of administrative decision making.

Not surprisingly, another "nonglobal" theory[14] basic to educational administration deals with the decision-making

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[13] See A. Etzioni, A Comparative Analysis of Complex Organizations (1961).

[14] R. Kimbrough & M. Nunnery, Educational Administration 116 (1976).

process.[15] Decision making is central to educational administration. To the extent that curtailment of the state action doctrine indicates judicial encouragement of private decision making, redefinition of state action is directly related to this concept. This is especially important because of abrogation, principally via 42 U.S.C. §1983, of the common law doctrine that "public officials were protected from civil suit in order to facilitate forthright decision making."[16] To the extent that nonpublic educational officials would be treated analogously to public officials, this is important.

Decisions regarding institutional employees and clients require that the educational administrator exercise his discretion rationally, and, it would be hoped, wisely. Thus, though rational decision making goes to the heart of procedural due process, it is submitted that computer-based decision technology could not apply. Ever present is the need to exercise judgment, quasi-judicial discretion. Administrators must work from a coherent value framework and must examine their basic assumptions.[17] Ethical, as

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[15] See D. Griffiths, Administrative Theory (1959).

[16] Jaffe, Suits Against Governments and Officers: Damage Actions, 77 Harv. L. Rev. 209, 223 (1963).

[17] See O. Graff, C. Street, R. Kimbrough, & A. Dykes, Philosophic Theory and Practice in Educational Administration (1966).

well as consistent, decisional behavior should be the touchstone of professional educational administration.

It is no coincidence, then, that value choosing and interest balancing, so basic to the concepts of state action and due process, are important in administrative decision making. The sociological, psychological, and anthropological dimensions of organizations viewed as social systems make this apparent. The decision maker must balance the first two dimensions, reflecting the institutional goals and personal needs involved, within the framework of cultural values imposed from without the institution. Administrative decisions regarding institutional employees and clients, though usually involving explicit balancing of the two dimensions, must also comport with the prevailing values of the culture.

If modern America places high value upon an open society based upon fair and equal treatment, then due process should be central to the decision-making process in nonpublic educational institutions. One means of effecting this would be judicial redefinition of state action, making procedural and substantive due process constitutionally required in nonpublic educational institutions. If, as this study indicates, this is not immediately forthcoming, an alternate means would be the institutionalizing of the appropriate response to the cultural dimension, the broader milieu, of those social systems called nonpublic educational institutions.

To be sure, notions of institutional automony and integrity pervade cultural values regarding higher education in particular, but the Constitution has, after all, come to the public campus. Similar value choosing and interest balancing can bring due process to the nonpublic campus by its own choice, its own decision.

That decision must necessarily take into account certain interests. Resource allocation is one. Implementation of due process machinery can be expensive. As one commentator noted, however, "it will cost time and money to do what due process demands . . . but it will be time and money well spent."[18]

The other side of the cost coin is financial support from alumni and other supporters of a given nonpublic educational institution. If that institution began to abide by constitutional due process standards required of public institutions, such friends of the institution could take alarm. Furthermore, it is not an unreasonable assertion that the old paternalism of in loco parentis better protected students, at least,[19] and that "in most cases, the student offender may fare much better under quasi-parental forms of correction than under a quasi-judicial

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[18] Wright, The Constitution on the Campus, 22 Vand. L. Rev. 1027, 1084 (1969).

[19] Id. at 1085.

procedure."[20] In any event, "if public and private institutions became indistinguishable, an important source of support for the whole field of endeavor would be jeopardized."[21]

Another interest that must be taken into account in any decision by a nonpublic educational institution to implement due process machinery is that nurturing element of education that makes educational institutions unique:

> In the "community of scholars" both mundane administration and broader academic pursuits are bound together by the notion that everything is part of the learning process. To force adversary proceedings upon such a community is to threaten this delicate balance and to upset the unique educational atmosphere.[22]

Just as leadership is an important aspect of educational administration, broadly defined, it is also crucial to decision implementation. Acting as a change agent in implementing voluntarily due process machinery calls for leadership, and for careful planning as well. Thus, even though the trappings of due process tend to legitimize

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[20] Crisis at Columbia: Report of the Fact-Finding Commission Appointed to Investigate the Disturbances at Columbia University in April and May 1968 97 (1968).

[21] O'Neil, Private Universities and Public Law, 19 Buff. L. Rev. 155, 164 (1969).

[22] Note, The State University, Due Process and Summary Exclusions, 26 Hast. L. J. 252, 261 (1974).

decisions dealing with institutional employees and clients,[23] the implementer must take care to ensure that, for example, the president of the institution has the authority to compel attendance of witnesses at hearings and to compel them to testify if present.[24]

In many educational institutions today decisions regarding personnel must be made pursuant to a collective bargaining agreement. The contract becomes an inescapable aspect of institutional governance.

To the extent that employees of nonpublic educational institutions engage in collective bargaining, some specified procedural due process for institutional employees is generally involved. This stems not from state action, but rather from the terms of the contract. Contractual due process may be less or more formal than that required constitutionally for public institutional employees, and may attach under different sets of circumstances. Grievance machinery established through negotiation varies in both specific requirements and definition of grievance. Some contractual grievance procedures end with binding arbitration, some do not. Some contractual definitions of

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[23]Note, Common Law Rights for Private University Students: Beyond the State Action Principle, 84 Yale L. J. 120, 123 (1974).

[24]See People ex rel. Bluett v. Bd. of Trustees, 134 N.E.2d 635 (1956).

grievance encompass complaints about extracontractual administrative policies and practices, some do not.

Regular procedural due process for employees instituted in nonpublic educational institutions would generally be coextensive with the negotiated grievance procedures established in contract. This would particularly be true in nonpublic institutions not engaging in state action; those institutions found under present standards or through future redefinition to be engaging in state action must meet minimal constitutional safeguards, which could be more specific or encompassing than the negotiated grievance procedure.

Substantive due process relates to grievance procedures only when policies, rules, and regulations are included within the contractual definition of grievance. In order to be most effective, the nonpublic institution administrator would eliminate arbitrary policies, rules, and regulations in any event. Thus, like procedural due process, substantive due process can be instituted via the collective bargaining contract, but should be instituted by the fair and thus more effective administrator without coercion from either a collective bargaining contract or redefinition of state action. On the other hand, it is good collective bargaining strategy to use such a "plum" as a bargaining lever in order to gain concessions, rather than to implement such a procedure unilaterally.

Since collective bargaining can be viewed not only as a model of governance but also as a vehicle for resolution of organizational conflict, some of its instrumentalities may be useful in situations involving institutional clients. One of these is impartial third party intervention.

Student-institution disputes could be settled by arbitration.[25] The impartial third party could be a single collective bargaining type arbitrator from outside the institution, or more likely would be a committee of faculty or faculty and students. In any case, the decision of the third party would be binding upon both the student and the institution.

This would not only relieve pressure on the administrator, but by its objectivity would seem to provide the student with fundamental fairness and "obviate any judicial intervention" into the institution's affairs as well.[26] Though procedural due process, whether or not constitutionally required because of judicial redefinition of state action, would be afforded, inconsistency of third party decisions with one another and with institutional norms could be a problem. The arbitrator may not be as committed

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[25] Wilkinson & Rolapp, The Private College and Student Discipline, 56 A.B.A. J. 121, 125 (1970).

[26] Id. at 125.

to the preservation of institutional norms as the administrator.[27]

A related mechanism for dispute resolution within educational institutions is the ombudsman. The idea reflects a felt need for an institutional component designed to rectify arbitrary administrative action and mistakes "with authority to lodge complaints, initiate judicial action and propose legislative reform."[28] The academic ombudsman could examine complaints of infringement upon either faculty or student rights and suggest changes in institutional policies or administrative practice. Thus, the ombudsman's functions could be characterized as conflict resolution and conflict management.[29]

The idea would seem to have some merit, and more than a few institutions have adopted it, but it can easily be viewed as operating on the assumption that institutional policies and administrative practice are not infrequently arbitrary. Effective administration should thus obviate institutionalization of an ombudsman because, it is submitted, fundamental fairness inheres in such administration.

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[27] Id. at 125.

[28] Kutner, Habeas Scholastica: An Ombudsman for Academic Due Process--A Proposal, 23 U. Miami L. Rev. 107, 153 (1968).

[29] Stewart, What a University Ombudsman Does: A Sociological Study of Everyday Conduct, 49 J. Higher Ed. 1, 4 (1978).

It could be argued that the previously mentioned impartial third party intervention is also obviated by effective administration, for the same reason. This may very well be true, but in such an event the available faculty or faculty-student committees would be called upon to function only rarely. Furthermore, in any event such as structure would seem better to comport with the collegial model of institutional governance than an academic ombudsman.

The ombudsman approach would seem appropriate, perhaps, in those educational institutions with structures lending themselves to the classic dysfunctions of bureaucratic organizations. Administrators of such institutions should recognize that organizational structure should reflect, not determine, institutional purpose. Moreover, even administrators who, because of their relatively low place in the hierarchy, or institutional norms, or bureaucratic resistance to innovation, cannot successfully lead an effort toward structural change, can still provide fundamental fairness in practice. The institutionalization of an ombudsman would seem a tacit admission that due process, whether or not constitutionally required, is not compatible with the policies or administrative practice of the institution.

Rectifying this admitted problem should come through leadership directed toward changing the organizational structure, if necessary and possible, and adopting and

developing commitment to the norms underlying procedural and substantive due process. As the structure is infused with value, mere organizational management becomes institutional leadership; the object of administration becomes the development and maintenance of what Selznick terms "institutional integrity."[30]

It is submitted that the ombudsman approach is symptomatic of a common organizational malady: patchwork structural attempts at mediating institutional failure to embrace the norms underlying due process. It is also submitted that, as Seavy noted so eloquently, such institutions can by their very nature achieve integrity only by consistently evincing institutional policies and administrative practice sedulously comporting to those norms. This final conclusion may well be the most important.

Legal compulsion, whether forthcoming through judicial redefinition of state action in regard to due process issues in nonpublic educational institutions, collective bargaining contracts, or some other legal theory such as a common law of private associations,[31] should not be a factor. The ethos of the culture, as well as the ethics of the profession, should determine the course of professional administrative behavior in nonpublic educational institutions.

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[30] P. Selznick, Leadership in Administration: A Sociological Interpretation 138 (1957).

[31] See Note, supra note 23.

This is perhaps a classic case of a genuine need for the ideal to become the real, for the promise of a theoretical concept to be realized in the context of practice.

Summary

It is concluded that expansive judicial redefinition of state action in regard to due process issues in nonpublic educational institutions has not occurred and is not occurring. Implications of the problem for educational administrators in nonpublic institutions are nonetheless varied and important. These range from questions of institutional compliance to questions going to the heart of the administrative process, from issues of resource allocation to issues of institutional philosophy.

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BIOGRAPHICAL SKETCH

Born in Silver City, New Mexico, in 1947, Dennis Dailey Murphy attended Florida public schools and graduated Valedictorian of Clearwater High School's class of 1965. He received his B.A. degree in Political Science from the University of Florida in 1969 and was selected into Phi Beta Kappa. He served as an officer in the United States Army until 1972, entered and graduated from the University of Florida College of Law in 1974, and became a member of The Florida Bar. He, his wife, Joni Lynn, and their son, John-Patrick, reside in New Brunswick, New Jersey, where he is on the faculty of Rutgers University.

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.

S. Kern Alexander, Jr.
Chairman
Professor of Educational
Administration and Supervision

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.

James L. Wattenbarger
Professor & Chairman Dept. of
Educational Administration and
Supervision

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.

Linda M. Crocker
Associate Professor of
Foundations of Education

This dissertation was submitted to the Graduate Faculty of the Department of Educational Administration and Supervision in the College of Education and to the Graduate Council, and was accepted as partial fulfillment of the requirements for the degree of Doctor of Philosophy.

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Dean, Graduate School